This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 577 814

Digitized by Google

HARVARD LAW SCHOOL
LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

may 1

4

VOL. 68. MICHIGAN REPORTS.

Cited in the following series:

U. S. Supreme Court (US; LEd, Lawyers' Edition); Federal Reports (Fed); Wisconsin (Wis); Massachusetts (Mas); Illinois (Ill); New Jersey Equity (NJE); New Jersey Law (NJL); New York (NY); and the Lawyers' Reports, Annotated (LRA) and its Annotation (n).

N. B.—Cut out and stick each block on page at its head, or citations for entire volume on inside front cover.

Always consult this table before using a case.

17:26 LRA 826n
33:12 LRA 263n
28 LRA 833n
36:168 Mas 121
90:144 US 429
36 LEd 493
8 LRA 843n
101:1 LRA 646
17 LRA 209n
116:7 LRA 641n
9 LRA 663n
133:4 LRA 557
5 LRA 315n
8 LRA 610n
153:9 LRA 803n
158:30 LRA101n
165:13 LRA 88
188:17 LRA177n
217:4 LRA 310n
220:1 LRA 192n
8 LRA 726n
258:13 LRA 88
265:8 LRA 858n
287:3 LRA 51
8 LRA 396
12 LRA 142
35 LRA 543
293:13 LRA 88
297:13 LRA 86
301:13 LRA 86
303:6 LRA 499n
6 LRA 501n
8 LRA 429
14 LRA 407
323:8 LRA 229n
11 LRA 337
23 LRA 704
355:9 LRA 216n
20 LRA 512n
389:6 LRA 499n
6 LRA 501n
36 LRA 434n
437:9 LRA 676n
454:3 LRA 632n
6 LRA 499n
6 LRA 501n
12 LRA 121n
14 LRA 407
480:158 Mas 159
8 LRA 529n
11 LRA 530n
19 LRA 210
487:1 LRA 386
10 LRA 544n
492:8 LRA 588n
24 LRA 437n
496:34 LRA401n
503:2 LRA 680n
3 LRA 472n
4 LRA 815
8 LRA 371n
514:4 LRA 645n
523:5 LRA 668n
531:2 LRA 809n
21 LRA 754
542:75 Fed 631
9 LRA 417n
32 LRA 52n
549:7 LRA 740n
8 LRA 529n
10 LRA 82n
10 LRA 135n
13 LRA 165
14 LRA 506
16 LRA 481
20 LRA 723n
21 LRA 583
24 LRA 361
27 LRA 533
29 LRA 475
31 LRA 165
33 LRA 328
35 LRA 561n
576:28 LRA 791
590:10 LRA 626
26 LRA 631
602:9 LRA 805n
620:52 Fed 197
17 LRA 599
625:2 LRA 681n
648:14 LRA814n
659:2 LRA 610n

Copyrighted by
All rights reserved.

The Lawyers' Co-Operative Pub. Co.
Rochester, N. Y.

Digitized by Google

Digitized by Google

may 1 4

MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JANUARY 5, 1888 TO MARCH 2, 1888.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 68.

CHICAGO,
CALLAGHAN & CO.,
1889.

Digitized by Google

Copyright, 1889, for the State of Michigan, by Gilbert R. Osmun, Secretary of State.

Digitized by Google

REPORTER'S NOTE.

Attention is called to the Terms of Court table for 1890 in this volume, which it is believed will be valuable as a ready reference, always at hand, and reliable, the data having been obtained direct from the judges.

I have also inserted a table of "Michigan Cases Cited," which will be valuable for annotation purposes; and in the index, under the title "Statutes Construed," have given a brief statement of the construction placed on the sections cited by the Court.

The rush of State work imposed upon the State printer in closing up his contract has caused an unavoidable delay in issuing volumes 68 and 69, which will be compensated for by putting on an extra force after January 1, 1890.

W. D. FULLER,
State Reporter.

Digitized by Google

Digitized by Google

STATE JUDICIAL DIRECTORY

For 1889.

SUPREME COURT.

THOMAS R. SHERWOOD (CHIEF JUSTICE), . . KALAMAZOO.
[TERM EXPIRES DECEMBER 31, 1889.]

ASSOCIATE JUSTICES:

		TERM EXPIRES.
JOHN W. CHAMPLIN, . .	GRAND RAPIDS, . .	Dec. 31, 1891.
ALLEN B. MORSE, . . .	IONIA, ...	Dec. 31, 1893.
JAMES V. CAMPBELL, . .	DETROIT, ...	Dec. 31, 1895.
CHARLES D. LONG, . . .	FLINT, ...	Dec. 31, 1897.

COURT OFFICERS:

CHARLES C. HOPKINS, .	CLERK, ...	LANSING.
MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
S. V. R. TROWBRIDGE, . .	ATTORNEY GENERAL, . .	IONIA.

Digitized by Google

CIRCUIT JUDGES.

1.	VICTOR H. LANE,	ADRIAN.
2.	THOMAS O'HARA,	BERRIEN SPRINGS.
3.	GEORGE GARTNER, HENRY N. BREVOORT, CORNELIUS J. REILLY, GEORGE S. HOSMER,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	FRANK A. HOOKER,	CHARLOTTE.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE,	SAGINAW.
	JOHN A. EDGET,	EAST SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, MARSDEN C. BURCH,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	CLAUDIUS B. GRANT,	MARQUETTE.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.*	SHERMAN B. DABOLL,	ST. JOHNS.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT, ... GEORGE S. SWIFT.
SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

* Comprises Clinton and Gratiot counties.

Digitized by Google

TERMS OF COURT FOR 1890.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Alcona	23	February 11.	June 24.	November 18.	
Alger	11	June 3.	Nov. 11.		
Allegan	20	February 10.	May 19.	October 6.	December 1.
Alpena	26	February 11.	May 6.	August 12.	November 4.
Antrim	13	March 11.	May 20.	July 22.	November 11.
Arenac	18	February 24.	Aug. 25.		
Baraga	12	January 6.	June 9.	October 6.	
Barry	5	February 10.	May 12.	August 18.	November 10.
Bay	18	March 4.	June 3.	September 2.	December 2.
Benzie	28	April 8.	Sept. 2.	December 2.	
Berrien	2	January 14.	March 18.	May 20.	October 21.
Branch	15	March 3.	June 2.	October 6.	December 1.
Calhoun	5	March 10.	June 2.	September 8.	December 1.
Cass	2	February 18.	April 22.	September 23.	December 2.
Charlevoix	13	February 18.	May 13.	July 15.	November 18.
Cheboygan	13	January 28.	March 25.	June 17.	September 23.
Chippewa	11	February 4.	May 13.	September 16.	
Clare	21	January 6.	March 31	June 23.	September 15.
Clinton	29	February 3.	April 28.	June 30.	November 10.
Crawford	23	January 14.	April 22.	October 7.	
Delta	25	January 7.	May 6.	September 30.	
Eaton	5	January 20.	April 21.	July 21.	October 20.
Emmet	13	February 11.	May 6.	July 8.	October 28.
Genesee	7	February 24.	May 26.	August 18.	November 17.
Gladwin	18	January 20.	May 26.	October 18.	
Gogebic	12	January 27.	May 12.	August 4.	November 8.
G'd Traverse	13	January 7.	April 1.	June 24.	October 14.
Gratiot	29	March 10.	June 2.	September 8.	December 1.
Hillsdale	1	January 14.	March 18.	September 2.	November 11.
Houghton	12	February 10.	May 26.	August 18.	November 17.
Huron	24	January 6.	March 3.	June 2.	October 27.
Ingham	4	January 6.	March 10.	May 26.	October 20.
Ionia	8	February 3.	May 5.	September 15.	November 3.
Iosco	23	March 4.	June 3.	September 2.	December 2.
Iron	25	January 15.	May 14.	October 8.	
Isabella	21	February 24.	May 19.	September 1.	October 20.

Digitized by Google

TERMS OF COURT FOR 1890.

COUNTIES.	CIR-CUITS.	SESSIONS OF COURT.			
Jackson	4	February 3.	April 21.	September 8.	November 17.
Kalamazoo	9	February 17.	May 19.	October 13.	December 8.
Kalkaska	28	January 14.	April 15.	September 9.	
Kent	17	March 3.	May 5.	September 22	December 1.
Keweenaw	12	January 13.	June 16.	October 13.	
Lake	19	February 17.	June 16.	October 13.	
Lapeer	6	January 13.	March 10.	July 14.	November 3.
Leelanaw	13	March 13.	June 10.	November 25.	
Lenawee	1	February 11.	April 22.	October 7.	December 9.
Livingston	7	January 15.	April 21.	June 16.	October 13.
Luce	11	May 6.	Nov. 4.		
Mackinac	11	February 25.	June 10.	October 14.	
Macomb	16	January 20.	April 21.	August 18.	October 20.
Manistee	19	January 20.	May 5.	August 4.	October 27.
Manitou	11	June 24.	Oct. 28.		
Marquette	25	February 10.	May 21.	September 8.	December 1.
Mason	19	February 3.	May 19.	August 25.	November 10.
Mecosta	27	January 7.	April 1.	July 1.	November 4.
Menominee	25	January 21.	April 22.	August 26.	November 11.
Midland	21	January 20.	April 14.	August 25.	September 29.
Missaukee	28	March 4.	July 15.	December 9.	
Monroe	22	February 4.	April 1.	September 9.	November 4.
Montcalm	8	March 3.	June 2.	October 6.	December 1.
Montmorency	16	May 20.	Sept. 16.		
Muskegon	14	February 10.	May 12.	September 8.	November 24.
Newaygo	27	March 4.	June 3.	October 7.	December 2.
Oakland	6	February 3.	May 5.	September 15.	December 1.
Oceana	14	January 13.	April 21.	August 18.	October 27.
Ogemaw	23	January 28.	May 13.	October 21.	
Ontonagon	12	January 20.	June 23.	October 20.	
Osceola	19	March 3.	June 2.	September 8.	December 1.
Oscoda	23	February 24.	May 26.	November 3.	
Otsego	26	January 21.	June 17.	October 7.	
Ottawa	20	January 13.	March 10.	August 4.	November 3.
Presque Isle	26	January 14.	June 10.	October 14.	
Roscommon	23	February 4.	May 27.	October 14.	
Saginaw	10	February 3.	April 14.	June 9.	Oct. 6. | Dec. 1.
Sanilac	24	January 20.	April 14	June 23.	September 22.
Schoolcraft	11	January 21.	April 22.	September 9.	
Shiawassee	7	February 3.	May 5.	September 8.	December 8.
St. Clair	16	February 17.	May 19.	September 15.	November 17.
St. Joseph	15	January 21.	March 25.	July 8.	October 28.
Tuscola	24	February 3.	May 5.	September 1.	December 1.
Van Buren	9	January 13.	April 14.	September 8.	November 10.
Washtenaw	22	March 3.	May 5.	October 6.	December 1.
Wayne	3	January 7.	April 1.	June 17.	September 9.
Wexford	28	January 21.	April 22.	July 22.	November 4.

Digitized by Google

TABLE OF CASES REPORTED

IN VOLUME 68,

WITH DIGEST OF POINTS DECIDED.

A

PAGE

ALTMAN v. RITTERSHOFER, ... 287

Promissory note—Promise to pay a fixed sum at a certain date, "and attorney's fees," is not—Certainty required in, must continue until the obligation is discharged.

AUDITOR GENERAL, SUPERVISORS OF SANILAC CO. v., . . . 659

AUDITORS OF WAYNE CO., BOARD OF METROPOLITAN POLICE OF DETROIT v., ... 576

B

BABCOCK, THORSEN v., ... 523

BAHLHORN, WALLACE v., ... 87

BAKER v. FLINT & PERE MARQUETTE R. R. CO., ... 90

Negligence—Right of child to cross a railroad track implies duty to use ordinary care in so doing, in view of his age, experience, and intelligence, etc.—If found to possess these in a sufficient degree to know of the danger incurred, and of the signals and warnings against it, and the manner in which he might be injured by failing to observe them, the jury may consider the question of his contributory negligence, which will prevent a recovery in case they find that he was injured by reason of a failure to observe such signals and warnings of danger—Ordinary care—Has relation to the situation and condition of the parties—Varies according to the demand for vigilance and attention—A child can only be held to that degree of care which

Digitized by Google

PAGE

Baker v. Flint & Pere Marquette R. R. Co.—Continued.

may be reasonably expected of one under the same circumstances, of the same age, sex, intelligence, and judgment —Contributory negligence—Where proper to consider as a defense, it is the province of the jury to judge of the child's capacity and ability, and the manner of their use by him, and whether he was of sufficient age and judgment to have used them otherwise, and thereby have avoided the accident.

BALDWIN v. CLOCK, ... 201

Charge to jury—Disparaging remarks concerning the value of the services of an attorney should not be indulged in—Payment—Is a matter of defense to be shown after plaintiff has made his case—Evidence—Receipt for payment for specific services, dated a year prior to those sued for, cannot be considered as covering later account.

BARE, KINNIE v., ... 625

BARHYTE v. SUMMERS, ... 341

Witnesses—Error to limit number to be sworn by either party, upon one of the main issues in the suit.

BASSETT, IN RE, ... 348

BEACHBOARD, STUBLY v., ... 401

BEAUDRY, LEONARD v., ... 312

BECK, MILLER v., ... 76

BECKWITH, SUTTON v., ... 303

BENNINGTON TOWNSHIP, MERKLE v., ... 183

BIGELOW v. REYNOLDS, ... 344

Trespass—For ouster of sublessees from mill standing on leased ground, lies in their favor if any one—Rental value —If allowable at all in an action for interrupting a lumbering business by a wrongful possession of a saw-mill, can only be considered as a possible element of, and not as actual, damages—Partnership—One partner cannot bring a separate action for his share of a partnership grievance—Estoppel—Grantor not bound by acts and doings of his subsequent grantees.

Digitized by Google

PAGE

BLISH v. COLLINS, ... 542

Fraudulent conveyances—Relationship of parties with whom insolvent debtor has dealings calls for closer scrutiny of such dealings—Inadequacy of price—Important evidence, varying with the circumstances of each case—Circumstances should be such as to amount to clear proof before party can be held liable for fraud—Inferences to be drawn therefrom must be inconsistent with theory of honesty and good faith in the transaction—Creditor must have a *certain* claim on the property of the debtor before he is concerned with his frauds.

BOARD OF AUDITORS OF WAYNE CO., BOARD OF METROPOLITAN POLICE OF DETROIT v., ... 576

BOARD OF METROPOLITAN POLICE OF DETROIT v. BOARD OF AUDITORS OF WAYNE CO., ... 576

Liquor traffic—Attempted grant of power to relators to enforce liquor law of 1887 in townships outside of Detroit, held illegal—*Mandamus* denied to compel payment by respondents of expense thus incurred.

BOARD OF SUPERVISORS OF IONIA CO., LEE v., ... 330

BOARD OF SUPERVISORS OF MONROE CO., ZINK v., . . . 283

BOARD OF SUPERVISORS OF SANILAC CO. v. AUDITOR GENERAL, 659

BRAND v. HINCHMAN, ... 590

Malicious prosecution—Suit for will lie without an arrest or seizure of property—Settlement of debt and payment of costs not a bar if the attachment complained of was malicious and without probable cause—Want of such probable cause raises a presumption of malice—Honest, though mistaken, belief of plaintiff that such probable cause exists, will not render him liable for malicious prosecution—Jury to determine honesty of belief by ascertaining what careful and prudent business men would have done under like circumstances—Evidence of the publication of notice of the attachment, and of circulation of newspaper, admissible as tending to show publicity given to act complained of—Defendant may show that his business reputation was good prior to issuance of writ—Service—Exhibition of writ to defendant in his store, and presence of officer to prevent removal of goods, amount to a constructive service or taking possession of property.

Digitized by Google

PAGE

BUNKER, TAYLOR v., ... 258

BURCH v. WOODWORTH, ... 519

Sawing contract—Joint agent—Statute of limitations.

C

CANER, MCCABE v., ... 182

CASS v. GUNNISON, ... 147

Sale—Of $3,000 worth of lumber out of any one of three grades, without further designation, to be loaded on the cars as ordered—Title passes when so loaded—Chattel mortgage—Covering all lumber on hand at a specified mill, and in transit, belonging to the mortgagors, being the lumber purchased of the mortgagees, is not constructive notice of lien upon lumber shipped after its execution—Residence—Is where a man's family reside in his homstead, though he is temporarily engaged in business in another place.

CHAFFEE, CITY OF DETROIT v., ... 635

CHAMPLAIN v. DETROIT STAMPING CO., ... 238

Pleading — Evidence of representations as to amount of goods he could sell, made by a traveling salesman at time of contracting for employment for stated period, at fixed salary, is incompetent under the general issue in a suit for an alleged wrongful discharge—Evidence—Of what other agents had done at other times, and under other circumstances, is immaterial in such a case, having no tendency to show plaintiff's ability—Charge to jury—That plaintiff, in such a case, is bound to seek for and perform other work if found, which should be set off against claim for damages—Sufficiently covers a request that if plaintiff obtained such work, and voluntarily relinquished it, he can only recover for the time subsequent to so securing it, the difference between the two contract rates.

CHICAGO & WEST MICHIGAN RY. CO., HARROUN v., ... 208

CHRISTMAS, HATCH v., ... 84

CILLEY v. VAN PATTEN, ... 80

Evidence—Optional with plaintiff to offer proof of such claims as he chooses—Jurisdiction—Of justice of the peace is

Digitized by Google

PAGE

Cilley v. Van Patten.—Continued.
determined by *ad damnum* clause in declaration—Plaintiff may remit portion of claim as established on the trial—Ownership—Of chattels or choses in action may be sworn to generally, and means of knowledge of witness can be secured on cross-examination—Of promissory note, put in evidence without objection, may be shown by evidence of its purchase of payee by plaintiffs—Lost paper—Parol proof of contents of lost execution, of a levy and sale thereunder, and of the return of the officer, is admissible after proof of loss.

CLARK, WINCHELL v., ... 64

CLEMENTS, PEOPLE v., ... 655

CLOCK, BALDWIN v., ... 201

COBBS v. FIRE ASSOCIATION OF PHILADELPHIA, ... 463
Waiver—May be proved indirectly by circumstances—Whether established or not is a question for the jury—Party in whose favor a condition or stipulation is made may always waive it—Exercise of such right is provable by parol as well as written evidence.

COBBS v. FIRE ASSOCIATION OF PHILADELPHIA, ... 465
Waiver—A question for the jury where testimony is conflicting—Province of the court to decide as matter of law, in absence of such conflict and where facts and circumstances tending to establish are admitted—Rehearing denied for reasons stated in the opinion.

COLLINS, BLISH v., ... 542

COOK v. CURTIS, ... 611
Action of covenant for breach of warranty—Declaration and notice to defend held sufficient—Service of notice properly treated as not in issue—Consideration recoverable is sum received for the land by the grantor—Recital of in deed not conclusive, but he may show receipt of less sum.

COOK v. HOPKINS, ... 514
Ejectment—Questions of fact as to claim of adverse title and notice held properly submitted to the jury—See *Cook v. Rounds*, 60 Mich. 310—Land contract, stipulating for title in fee on performance, never expires by its own limitations, except by forfeiture for breach of condition—

Digitized by Google

PAGE

Cook v. Hopkins.—Continued.
Vendor has no right of entry for any other reason—Statute of limitations—Bars ejectment after 20 years *adverse* possession after default in last payment stipulated for in such a contract.

COX V. WELCHER, ... 263
Taxes—Payment of in advance of time it can be enforced is voluntary, and recoverable only by statutory permission—If involuntary, and under legal duress, no specific protest is required—Will be treated as made without consideration.

CRITTENDEN, OLCOTT V., ... 230

CURTIS, COOK V., ... 611

D

DALY, CITY OF DETROIT V., ... 503

DAYTON V. DAYTON, ... 437
Equity practice—Conclusions of circuit judge upon testimony taken in open court, not usually disturbed, unless decided convictions of appellate court lead to different conclusions—Tender—If found insufficient, bill filed for discharge of mortgage on that ground may be retained as one to redeem, under general prayer for relief, and offer to pay whatever may be found due defendant.

DELTA LUMBER CO., LINDSTRAND V., ... 261

DETROIT & SALINE PLANK-ROAD CO. V. MAHONEY, ... 265
Toll-gate—Penalty for illegally passing—In suit for, executory agreement by directors of toll-road with city alderman, to surrender right to collect toll within city limits, no defense—Nor is belief of defendant that gate was illegally maintained.

DETROIT, CITY OF, V. CHAFFEE, ... 635
Street-opening case—Award of full value of land taken affirmed.

DETROIT, CITY OF, V. DALY, ... 503
Condemnation proceedings—Certain provisions of Detroit

Digitized by Google

PAGE

Detroit, City of v. Daly.—Continued.
city charter criticised—*Real* public necessity must exist before citizen can be disturbed in enjoyment of freehold in his own way—Such necessity must be as great where land is owned *separately* as where it is part of a *larger* property—In latter case public have no right to force its sale for less than its independent value—Assessment—Must be based on some legally ordained basis of apportionment—Charge, whether based on supposed benefits or any other legal burden, must be spread over the taxing district in compliance with some uniformly applied rule—Taxing district—Discretion in fixing cannot be so uncontrolled as to leave no public character to the district—Theory of charging expense of public works on property benefited, stated, and essentials laid down—Price paid by the public for land taken can never be lawfully less than its value.

DETROIT KNITTING & CORSET WORKS, MERCHANTS' NATIONAL BANK OF CHICAGO v., ... 620

DETROIT STAMPING CO., CHAMPLAIN v., ... 238

DOUGAN, MONTAGUE v., ... 98

E

EATON v. EATON, ... 158
Equity pleading—Legal and equitable owners of judgment may join in bill to protect execution lien—Where the purposes, objects, and parties in two suits are different, one cannot be pleaded in bar of the other—Parties—If all known parties in interest are before the court, the possible interest of other parties is no reason for refusing the relief sought.

ELLIS, PLANO MANUFACTURING CO. v., ... 101

ELLSWORTH, PEOPLE v., ... 496

EVANS v. GRAND RAPIDS, LANSING & DETROIT R. R. CO., 602
Homestead—Averment that complainants are living upon 40 acres of land, which is their homestead, necessarily implies that the land is not worth over $1,500—Contract for right of way signed by husband *alone* void—Entry by defendant under such a claim, and subsequent action,

Digitized by Google

PAGE

Evans v. Grand Rapids, Lansing & Det. R. R. Co.—Continued.
held an aggravated assault on rights of wife, and properly enjoined.

F

FERGUSON v. GLASSFORD, ... 86

Equity—Will consider an incumbrance in force if the ends of justice can be thereby secured—Discharge of mortgage—If through mistake, equity will restore the mortgage, with its original priority of lien, except as to intervening rights—Will not bar a foreclosure in the absence of actual satisfaction—Is evidence of a high character, and sufficient to sustain the rights of all parties interested, unless the claimant under the mortgage makes satisfactory proof of accident, fraud, or mistake in making such discharge—And is conclusive proof of payment in favor of third persons, who have a right to look to the record for protection in the absence of such showing—Subsequent purchasers and incumbrancers in good faith have the same rights as if claiming against unrecorded conveyances—Can be affected only by actual notice, or notice of such facts as should have put them upon inquiry.

FIRE ASSOCIATION OF PHILADELPHIA, COBBS v., ... 463, 465

FITCH, FRENCH v., ... 115

FLINT & PERE MARQUETTE R. R. CO., BAKER v., ... 90

FLYNN v. FLYNN, ... 20

Deed—True consideration may always be shown where material so to do.

FOSTER v. LUMBERMEN'S MINING CO., ... 188

Contract for sale of personal property—Not enforcible where purchase price depends on amount received on its resale by vendee—Title to will not pass unless purchase price is fixed, as also time and terms of payment, where sold on credit—Nor until its delivery, where such is the intent of the parties—Owner who has not parted with title or right of possession cannot be guilty of its unlawful conversion—Statute of frauds—Applies to contract between a citizen and corporation of Michigan, to be fully performed in

Digitized by Google

PAGE

Foster v. Lumbermen's Mining Co.—Continued.
said State, regardless of residence of corporation's agents or servants.

FOWLER, JOHNSON v., ... 1

FREEMAN v. FREEMAN, ... 28

Parol testimony—Inadmissible to vary an unambiguous agreement, complete in itself, and not attacked for fraud or mistake.

FRENCH v. FITCH, ... 115

Costs—Expense of procuring copy of testimony necessary for settlement of bill of exceptions held properly taxable under decision in *Maynard v. Vinton*, 59 Mich. 155.

FREY v. MICHIE, ... 328

Title to office—Cannot be litigated by *mandamus*—Can only be finally settled by *quo warranto*—For various interesting propositions relating to such proceedings, see summary under head-note 2.

G

GALLOP ESTATE, TYLER v., ... 185

GARGETT, MCNAMARA v., ... 454

GARRETT, PEOPLE v., ... 487

GEIGES v. GREINER, ... 153

Attachment suit—Against two defendants—Affidavit averring that *both* are justly indebted to plaintiff will support a claim that they are *joint* debtors—Execution—Delay of two months in levying after legally issuable will not release attachment lien—Ejectment—Equitable title cannot be set up against legal title—Homestead—Erection, by owner of two city lots, of house, which by mistake encroaches a few inches over the division line, will not destroy homestead right—Supposed division line will be treated as true one in order to protect it—In such a case, where lots form one inclosure, with no visible line of separation, and do not exceed the statutory value, and are occupied as one lot, homestead exemption is held to cover the entire premises.

GLASSFORD, FERGUSON v., ... 36

Digitized by Google

PAGE

GRAND RAPIDS, LANSING & DETROIT R. R. CO, EVANS v., . . 602

GREINER, GEIGES v., ... 153

GRUMMOND, WHITAKER v., ... 249

GUNNISON, CASS v., ... 147

H

HALDANE, SWEET v., ... 639

HARROUN v. CHICAGO & WEST MICHIGAN RY. CO., ... 208

Jury—Should not be permitted to take statements made by counsel to jury-room, unless by consent of opposite party—Only exception is in case of long accounts, where there is no bill of particulars—Discretionary for circuit judge, in such cases, to allow lists of the items claimed on both sides to go to the jury-room—*Millar v. Cuddy*, 43 Mich. 274, qualified accordingly—Error without prejudice—Action for value of stock killed by railway company—Allowing jury to take a statement showing highest values sworn to by plaintiff's witnesses, held to be error without prejudice, where verdict was for less than the average of such sums, with legal interest.

HARSHMAN, ZABEL v., ... 270, 273

HATCH v. CHRISTMAS, ... 84

Certiorari—If affidavit fails to aver that no showing was made on oath for an adjournment, a return by the justice that it was duly applied for upon showing made raises a presumption of a legal showing, and sufficient grounds—Adjournments—Three months to which justice is limited date from return-day of process—Jurisdiction—Failure of sureties to justify by indorsement on replevin bond not jurisdictional—New bond may be filed if objection is seasonably made.

HATCH v. VILLAGE OF ST. JOSEPH, ... 220

Bill to quiet title—Stating facts entitling complainant to equitable relief—May be sustained under Act No. 260, Laws of 1887, though filed prior to its taking effect—Trust-deed—By which grantor divests himself of all title, without power of revocation—Equity will not revoke for alleged non-performance of trusts after lapse of 30 years

Digitized by Google

PAGE

Hatch v. Village of St. Joseph.—Continued.
and intervening rights have attached—Beneficial grant—Law presumes its acceptance—Statute of limitations—Applied in equity where a bar to claim at law.

HAUG, ROBISON v., ... 549

HILLMAN v. SCHWENK, ... 293

Witness—Indorsee, claiming under an alleged forged indorsement, is not disqualified as a witness because the payee's devisee indemnifies the defendant, and is active in making said defense—Credibility of a witness who has sworn falsely as to one material fact is exclusively a question for the jury, who may credit other portions of his testimony which they believe to be true.

HILLMAN v. SCHWENK, ... 297

Estates of deceased persons—Title to personal property vests in executor for purposes of administration—Devisees and legatees have a remedy if he fails to collect the assets, but cannot represent the estate in the prosecution or defense of suits—If executor indemnifies a defendant, or assumes the defense of a suit involving the title to a promissory note purporting to have been transferred by the indorsement of the testator, which is claimed to be a forgery, the plaintiff cannot testify to any facts equally within the knowledge of such testator.

HILLMAN v. SCHWENK, ... 301

Evidence—Witness—Administrator assuming defense of suit—Indorsement of note—Forgery.

HINCHMAN, BRAND v., ... 590

HOOD v. OLIN, ... 165

Logging contract—Agreement to furnish teams—Retention of title until paid for—Application of credits—Replevin—Demand—Witness—Facts equally within knowledge of deceased person.

HOPKINS, COOK v., ... 514

HORRIGAN, PEOPLE v., ... 491

HUNT, POTTER v., ... 242

Digitized by Google

PAGE

HURLEY v. WATSON, ... 531

Principal and agent—Ignorance of the extent of agent's authority no excuse—Authority to collect money does not authorize agent to receive anything else in payment—Carelessness of principal will not make him liable to party who fails to exercise due diligence, etc.—General authority to sell goods or collect debts does not authorize agent to apply his private debt to a third party in payment of debt to the principal—If this is done, third party has *onus* of showing agent's express authority, or ratification—Principal must have full knowledge of the facts claimed to have been ratified—Books of account—Owner presumed to be cognizant of contents of—Strength of such presumption depends on whether he made entries in person, or by clerk or book-keeper—May be overcome by positive uncontradicted testimony of owner to such latter fact, and his want of knowledge of contents of books—Generally a question for jury whether silence affords a reasonable presumption of ratification under the circumstances of the case.

HURSH, SCRIVEN v., ... 176

HUX, PEOPLE v., ... 477

I

IN MATTER OF GUARDIANSHIP FOR GEORGE R. BASSETT, . . 848

Mentally incompetent person—Petition for appointment of guardian must show that petitioner is authorized by the statute to make it—And inform the court *who* will be affected by such appointment, which includes presumptive heirs and distributees—Averment of necessity for such appointment, because the person is mentally incompetent to have the care and management of his property, sufficient—Order must cover both person and estate—Adjudication of incompetency essential, and must appear of record—If proceeding for appointment of *general* guardian is illegal, appointment of *special* guardian based thereon is also illegal.

IN RE RIOPELLE STREET, ... 508

IN RE WILLIS AVENUE, ... 635

Digitized by Google

J

PAGE

JASPER TOWNSHIP, WROUGHT IRON BRIDGE CO. v., ... 441

JOHNSON v. FOWLER, ... 1

Partnership—Dissolution and accounting—Equitable lien—Payment of partnership debts—Specific performance of agreement to convey joint real estate to one copartner.

K

KENNEDY, MACE v., ... 389

KING, PONTIAC, OXFORD & PORT AUSTIN R. R. CO. v., . . . 111

KINNIE v. BARE, ... 625

Drain law of 1885—Petitioners only required to be freeholders—Course of drain may be described by center line—Record of survey describes width each side of center line and additional land upon which to deposit excavation—Petition need only contain an approximate description of route and *termini* of drain—Practical route and *termini* to be determined by survey—*Ex parte* action of commissioner stated—Taking private property can only be upheld on ground that drain is necessary for public health—Application for appointment of commissioners must describe each parcel of land proposed to be taken with as much certainty as is required in a deed of bargain and sale—Should contain *data* to enable commissioners to locate each parcel, and compute its area—If, after their appointment, the commissioners are found to be disqualified, proceedings to appoint others must be taken *de novo*.

L

LANGTRY v. WAYNE CIRCUIT JUDGES, ... 451

Attachment suit—Personal service will not confer jurisdiction if affidavit defective—Writ issued by justice does not operate as a summons—Personal service will not confer jurisdiction unless made after levy, and accompanied by statutory inventory—Non-residents—Entitled to speedy hearing, and if actually summoned they have no delay beyond four days.

Digitized by Google

PAGE

LEE v. BOARD OF SUPERVISORS OF IONIA CO., ... 330

Definitions—Terms "committed" and "discharged" refer to the beginning and end of a term of imprisonment—Fees—Charges by a sheriff for taking a prisoner to and from court are not covered by the statute allowing a fee of 35 cents for every person committed to and discharged from jail—Board of supervisors—Specified fees, over which they have no discretion, should not be made to include anything not fairly within their terms.

LEONARD v. BEAUDRY, ... 312

Sawing contract—Damages for non-delivery of logs under—Measured by difference between cost of manufacture and contract price—Loss of profits—When claimed as measure of damages, the question is whether such damages are too conjectural, speculative, or contingent to form a safe basis for estimating damages—If the elements out of which the profits were to arise can be ascertained with reasonable certainty, the difference between cost of performance and compensation measures the damages sustained by breach of the contract, whether called gains prevented or loss of profits.

LINDSTRAND v. DELTA LUMBER CO., ... 261

Negligence—Plaintiff held to be guilty of such negligent and reckless conduct as precludes a recovery.

LUCAS, SKINNER v., ... 424

LUMBERMEN'S MINING CO., FOSTER v., ... 188

M

MACE v. KENNEDY, ... 389

Promissory note—Alleged to have been fraudulently obtained—Defendant may be asked on cross-examination to specifically point out the circumstances and facts constituting the alleged fraud—Reputation and business of other purchasers of similar notes cannot be inquired into—If the purchase of such notes is claimed to be in itself a badge of fraud, and part of a scheme to defraud the community generally, plaintiff may show absence of any thought of such fraud abroad in the community at time of purchase—

Digitized by Google

PAGE

Mace v. Kennedy.—Continued.

Bona fide holder—Must be shown to have had knowledge of such facts and circumstances as made the taking of the paper with the intention of enforcing payment an act of bad faith—Burden of proof—Is on such holder to show himself such, after proof that note was fraudulently obtained of the maker—Requests to charge—If based upon finding by the jury of distinct misrepresentations made in obtaining note, their refusal is error, which is not cured by bunching the several propositions in the general charge, and leaving jury to infer that they must find all of the alleged misrepresentations to have been made.

MAHONEY, DETROIT & SALINE PLANK-ROAD CO. v., ... 265

MCCABE V. CANER, ... 182

Pleading—Notice of fraud and misrepresentation in procuring notes sued on must be given with plea of general issue—Consideration—Relinquishment of rights in government homestead is a good consideration for notes given for price agreed to be paid for such interest.

MCCLURE V. THORPE, ... 33

Pleading—Declaration not demurred to, and stating a case, and under which such case was made without objection, will be held sufficient in the appellate court—Tenant in common—Has a right of action for conversion of joint property by co-tenant—Landlord and tenant—Ouster by landlord, and conversion of crop put in on shares—Damages—Value of crop harvested, and depreciation, if any, through negligence of defendant—Less value of his labor in caring for and harvesting, and his interest in the crop.

MCCOY, MCDANIEL V., ... 332

MCDANIEL V. MCCOY, ... 332

Equity practice—A feeble minded person not under guardianship may file a bill by solicitor and counsel—Courts of equity, instead of dismissing same, will see that his rights are not sacrificed—Such cases are so dependent on their own facts that it is of little use to attempt to measure them by exact precedents—Equitable rules applicable are familiar, and not technical.

MCLEAN, PEOPLE V., ... 480

Digitized by Google

PAGE

McMORRAN v. MURPHY, ... 246

Payment—Renewal notes are not where no payment is in fact made—Replevin—Of chattel-mortgaged property—Mortgagor may testify to its sale prior to filing of mortgage, and to want of actual notice to vendees.

McNAMARA v. GARGETT, ... 454

Construction of contract—Two instruments executed at the same time, and relating to the same subject, form one contract—False representation that association executing a contract is incorporated under the State law will defeat a recovery upon a note given in consideration of such contract, as between the parties, or by a purchaser with notice before paying for the note—Public policy—Contract at war with interests of society and morals of the times will be held void on the ground of public policy, regardless of private interests, which must be subservient to the public welfare—If illegal in part the entire consideration is void—"Bohemian oat note and bond"—Form one contract, and will be construed as if written on one piece of paper—As between the original parties, and purchasers with notice, are void.

MERCHANTS' NATIONAL BANK OF CHICAGO v. DETROIT KNITTING & CORSET WORKS, ... 620

Corporation—Note of given for individual obligation presumptively *ultra vires*—Special authority required, existence of which must be ascertained at peril of persons taking such paper—Custom of manager to make and discount corporation notes to meet its expenses has no tendency to prove his authority to accept accommodation drafts drawn on it—Nor can it be made liable on such acceptances by reason of entry of account of same on its books without direction or knowledge of its officers.

MERKLE v. TOWNSHIP OF BENNINGTON, ... 133

Repealing statute—Substantially re-enacting law repealed will not affect pending suits, though not protected by saving clause—Pleading—Designed to apprise court and opposite party of pleader's claim—Certainty to a common intent required—Sufficient to describe the neglect of duty relied on, and resultant injury, with substantial accuracy

Digitized by Google

PAGE

Merkle v. Township of Bennington.—Continued.
—If evidence of cause of injury is not objected to for variance from the case alleged in the declaration, it should be deemed waived, unless the variance is substantial, in which case the declaration should be treated as amended to meet the proofs—Requests to charge—Error for alleged refusal to give, not assignable if circuit judge certifies that they were not presented to him to his recollection—Evidence—That a bridge "was a poor, shackly one," and "that from the personal knowledge of a witness it was in good repair," admissible—Error without prejudice—Striking out latter testimony as incompetent is, where witness stated facts showing, if believed, the truth of the rejected opinion—Practice in circuit courts—Failure to state reasons for objection to testimony will bar review in appellate court—Charge to jury—Proper to challenge attention to precise place in a bridge where it is claimed to have been out of repair, and to the question of its repair at that place, where these questions are in dispute—Executors and administrators—Statutory liability for negligence resulting in death is a chose in action and assets in the hands of the personal representative—If executor refuses to enforce collection, and is discharged, probate court may appoint a successor to perform that duty.

MICHIE, FREY v., ... 323

MILLER v. BECK, ... 76

Pleading—Adverse possession, as a defense in ejectment, may be shown under the general issue—Charge to the jury—Court has a right to presume that an ordinary jury has ordinary intelligence, and that the word "adverse," in itself, means "hostile and distinct," when applied to define a possession of land.

MINER, ROBISON v., ... 549

MITCHELL v. MITCHELL, ... 106

Partition—Of estate by the heirs without administration—Acquiescence in for twenty years bars attack by one of them to disturb or impeach it.

MONFORT v. STEVENS, ... 61

Contract—Object of construction of is to arrive at true intent

Digitized by Google

PAGE

Monfort v. Stevens.—Continued.
of the parties—Deed—Action of parties immediately after its execution affords a safe criterion of their intention as to the meaning of its language.

MONTAGUE v. DOUGAN, ... 98
Findings of fact—If supported by any evidence will not be disturbed—Books of account—Testimony of third parties to settling from same, and that they were correctly kept, not essential, since the parties to a suit have been made competent witnesses, to make such books competent evidence—May be used to show to whom goods were charged and credit given, where plaintiff claims a sale to defendant, to whom credit was given, and by whose orders the goods were delivered to a third party, which defendant denies.

MORAN, STEFFES v., ... 291

MURPHY, MCMORRAN v., ... 246

MUSKEGON BOOMING CO., WITHERAL v., ... 48

MUTUAL BENEFIT LIFE INS. CO. v. WAYNE CO. SAVINGS BANK, 116
Married woman—Introduction in evidence of a promissory note signed by her jointly with her husband, with proof of such signature, will not make a *prima facie* case against her—Her contract, to be binding, must be made on behalf of her sole property, which intent should appear, as also a consideration that will sustain it for that purpose—Burden of proof on plaintiff to clearly show for what purpose she contracted—Evidence—On facts stated in head-note 8, a lost assignment of an insurance policy is held sufficiently proved—Life insurance—Wife may secure on life of her husband, in her favor, payable in case of her prior death to their children, etc.—Conflict of laws—Validity of assignment of foreign insurance policy is determined by laws of state where made and sought to be enforced.

N

NEW BUFFALO TOWNSHIP, PHILLIPS v., ... 217

NEWHALL, WHITE v., ... 641

Digitized by Google

O

PAGE

O'BRIEN, PEOPLE v., ... 463

OLCOTT v. CRITTENDEN, ... 280

Statutory foreclosure—Not available where there are conflicting equities, demanding the protection of the chancery court—A purchaser of mortgaged premises, subject to a mortgage held by a creditor of the mortgagee as security for a *smaller* debt—Which claim he buys, and takes an assignment of the mortgage, with knowledge of the rights of his assignor therein—Will hold in trust for the owner of the mortgage as to the balance due, which will remain a lien on the land.

OLIN, HOOD v., ... 165

P

PALMS v. PALMS, ... 855

Construction of will—Perpetuities—Royalties under mining leases.

PEOPLE v. CLEMENTS, ... 655

Criminal law—Debtor may make reasonable resistance to attempted seizure of exempt property under writ of attachment.

PEOPLE v. ELLSWORTH, ... 496

Synonymous terms—"Conviction" and "sentence" are not—Sentence on conviction of larceny as for a third offense, under How. Stat. sec. 9425—Illegal for excess above five years, where information charges two prior convictions but only one sentence—Nor can it be sustained for such excess under How. Stat. secs. 9141, 9424—All doubts must be solved in favor of the accused—Record must show exact offense intended to be punished, and there should be no reasonable doubt for what crime respondent is sentenced—Plea of guilty—If entered after consultation with counsel and interview required by the statute, the circuit judge will be presumed to have been satisfied that plea was freely made, etc.

Digitized by Google

PAGE

PEOPLE v. GARRETT, ... 487

Liquor traffic—Sale of liquor, where delivery is to one known to be a minor, unlawful.

PEOPLE v. HORRIGAN, ... 491

Criminal law—Dwelling-house—Building, the upper part of which is used for offices, and at night one occupant sleeps in a room in basement, his only abiding place, held to be.

PEOPLE v. HUX, ... 477

Criminal law—Return of justice on appeal that respondent was present when verdict was rendered is conclusive—Adjournment—On application of respondent, and by consent of prosecuting attorney, will not oust justice of jurisdiction though for more than one week.

PEOPLE v. MCLEAN, ... 480

Criminal law—Allegation that a warrant was "issued by a justice of the peace" is not equivalent to averment that it was "issued by lawful authority"—Misdemeanor—Arrest for, after commission of act, cannot be made without warrant—Sheriff must be present either in sight or hearing directing the arrest to justify person not armed with a warrant in making it.

PEOPLE v. O'BRIEN, ... 468

Practice in Supreme Court—Record as settled by circuit judge cannot be amended unless upon proceedings taken before hearing—Evidence—Statements made in presence of accused are hearsay, unless made under such circumstances as to raise a presumption of acquiescence on his part—Argument to jury—Error to permit prosecuting attorney to comment unfavorably on failure of respondent to swear a witness whose statements as shown by the people were improperly received in evidence—Bill of exceptions—In criminal case presumed to contain all of the evidence relating to the subject of the exceptions—Witness — Although of bad reputation, and testifying falsely in some particulars, that portion of his evidence which the jury believes to be true may be accepted—Jury should closely scan the testimony of such a witness, which will be regarded with suspicion.

Digitized by Google

PAGE

PEOPLE v. WHITE, ... 648

Criminal law—Discharge of respondent on his request—Cause of must be set forth in plea in bar to advise court if it was by consent, and for reasons and under circumstances amounting to an acquittal.

PHILLIPS v. TOWNSHIP OF NEW BUFFALO, ... 217

Statutes—Prospective in their operation, unless a contrary intent is expressly declared or necessarily implied—Act No. 8, Laws of 1885, extending time for collection of taxes, not retroactive.

PINGREE v. STEERE, ... 204

Replevin—By mortgagees entitled to the possession of an entire stock of boots and shoes—Sufficient to describe property as "sufficient of said stock [locating same, etc.] to satisfy plaintiffs' claim as mortgagees, amounting to $805."

PLANO MANUFACTURING CO. v. ELLIS, ... 101

Construction of contracts—All parts must be examined, and effect given to every word and phrase, if practicable—Unambiguous language expresses the intention of the parties—Resort to condition of the parties, the subject-matter of the contract, and the surrounding circumstances, as aids to the court, is only proper where the language used is not free from doubt or uncertainty—Agreement that a binder is to do good work and give satisfaction embraces independent conditions, upon both of which the purchaser may rely.

PONTIAC, OXFORD & PORT AUSTIN R. R. CO. v. KING, . . . 111

Donation note—Payment conditioned on running trains by a given date—Condition sufficiently performed by running construction trains, although road not ballasted or fit for freight or passenger traffic.

POTTER v. HUNT, ... 242

Practice in circuit court—Motion to vacate a satisfaction of a judgment for costs recovered on an appeal to the circuit court by one of two defendants, the other refusing to join in or share the expenses of such appeal, but who, after the judgment had been turned out by the active appellant to

Digitized by Google

PAGE

Potter v. Hunt.—Continued.
his attorneys for their fees, executed said satisfaction, should be granted—*Certiorari*—Will lie to review a judgment denying such motion.

POTTER V. SMITH, ... 212

Parol gift of land—Under which adverse possession is held for more than 20 years, with claim of ownership, will be protected in equity as against subsequent grantees and execution creditors of donor—Donee will hold subject to a subsequent mortgage, of which she had full knowledge, and sought to redeem from after foreclosure making no claim of its invalidity.

POTTS V. POTTS, ... 492

Alimony—Order held reasonable in this case—Possession of non-productive property, etc., by wife, no bar to allowance of—Demand unnecessary to warrant proceedings for contempt for non-payment of, where husband informs wife that he will not pay it.

PRICE V. STAGRAY, ... 17

Highways—Record must show affirmatively a compliance with the statutory provisions authorizing a discontinuance, and the jurisdiction of the commissioner—If hearing is adjourned, no action can be taken until the adjourned day—Ten full days' notice is required of the original hearing.

R

REYNOLDS, BIGELOW V., ... 344

RITTERSHOFER, ALTMAN V., ... 287

ROBISON V. MINER AND HAUG, ... 549

Constitutional law—Title to liquor law of 1887 covers but one general subject-matter—Law reviewed, and following provisions held unconstitutional—Authorizing rejection of bond on ground of unfitness of principal, as to character and habits, to engage in the business—Authorizing county treasurer to require new bonds in *any* contingency that he shall determine requires it—Authorizing arrest without warrant, and closing place of business—Forfeiting right to

Digitized by Google

PAGE

Robison v. Miner and Haug.—Continued.
carry on or engage in said business—New taxes and penalties not involving these peculiar disabilities held valid, as also new methods of prosecution in circuit courts.

ROGERS v. WHITE, ... 10

Ejectment—Based upon tax deeds—Evidence—Of conveyance by warranty deed to defendant by party in peaceable possession, and of like possession by defendant at time suit was brought, after which his grantor acquired the government title, entitles defendant to contest the validity of plaintiff's title—Taxes—Excess of $25 in township tax invalidates tax deed—Township clerk—Orders drawn by for repair of bridge held illegal, as also tax to pay same, for reasons stated in head-note 8.

S

ST. JOSEPH VILLAGE, HATCH v., ... 220

SCHWENK, HILLMAN v., ... 293, 297, 301

SCRIVEN v. HURSH, ... 176

Mortgage—Foreclosure—Subrogation.

SKINNER v. LUCAS, ... 424

Receiver—Appointment of binding on defendants who have fully recognized such officer—Costs—Chancery rule No. 6 does not prescribe form in which security shall be given—Such question only material when judgment is applied for against sureties as well as principal—Approval of security not a condition precedent to liability thereon—If actually executed and filed with proper officer, his views as to receiving it as a compliance with order, immaterial.

SMITH, POTTER v., ... 212

STAGRAY, PRICE v., ... 17

STEERE, PINGREE v., ... 204

STEFFES v. MORAN, ... 291

Public wrongs—Must be redressed by people's public agents, and not by private intervention—Doctrine laid down in *Miller v. Grandy*, 18 Mich. 540, adhered to.

STEVENS, MONFORT v., ... 61

Digitized by Google

PAGE

STUBLY v. BEACHBOARD, ... 401

Pleading—Declaration *properly* counting on three transactions as one deal from its commencement to final determination, and by means of which plaintiff was defrauded of his money—Added counts separating the transactions do not set forth a new cause of action—Evidence—Note of third person which may be needed as evidence need not be tendered to defendants before bringing such suit—Concert of action of passive defendant, with one active in procuring such money, may be shown by his statements made to plaintiff after the transaction—Occupancy of land by third persons claiming under original title, at time of loan made on representations that title is perfect, is competent evidence tending to show the falsity of such representations—Fraudulent purchase of goods—Competent to show distinct purchases by vendee under similar circumstances at or about the same time.

SUMMERS, BARHYTE v., ... 341

SUPERVISORS OF IONIA CO., LEE v., ... 330

SUPERVISORS OF MONROE CO., ZINK v., ... 288

SUPERVISORS OF SANILAC CO. v. AUDITOR GENERAL, ... 659

Swamp-land legislation—*Mandamus* to compel payment to relator of tax raised under Act No. 222, Laws of 1885, denied—Proviso of section 2 of said act not covered by the title, and void.

SUTTON v. BECKWITH, ... 303

Promissory note—Executed cotemporaneously with agreement to be performed before its maturity—The two form one transaction, and, as between the parties, such performance is essential to the enforcement of the note—Purchaser before maturity, with knowledge of such agreement and its relation to the note, is bound the same as if both were written on the same piece of paper—Estoppel—Maker who represents to a proposed purchaser of his note that it is all right, and agrees to pay it, is estopped from pleading failure of consideration or other invalidity if purchase is made in reliance upon said statements.

SWEET v. HALDANE, ... 689

Statute of limitations—Proceedings in equity did not suspend

Digitized by Google

PAGE

Sweet v. Haldane.—Continued.

operation of until 1857—How. Stat. sec. 8788, will not have that effect unless equitable suit is instituted by the same party who wishes to plead the statute.

T

TAYLOR v. BUNKER, ... 258

Witness—Knowledge by third persons of facts which a plaintiff is disqualified from testifying to in suit against a deceased person will not remove statutory bar—Nor will the fact that on a former trial both parties were witnesses, thus enabling the administrator to use defendant's former testimony on rebuttal, the issue having been changed by amendment of the declaration since the death of the defendant.

THORPE, MCCLURE v., ... 88

THORSEN v. BABCOCK, ... 523

Negligence—Creating responsibility is that which has caused the mischief done—Redundant charges of, if proved, not only confuse the real issues, but generally lead to convictions not based on the real charge—Special findings of jury negativing case made by declaration, and negligence of defendants, entitle them to judgment.

TYLER v. GALLOP ESTATE, ... 185

Estates of deceased persons—Judgment entry in circuit court, on appeal from commissioners on claims, should be an allowance or disallowance of the claim, which should be certified to the probate court—Minor—Party claiming ratification by of contract has burden of proof—Silence for two years after arriving at full age raises no presumption of—Must be by an express promise, or acts equivalent to a new contract—Emancipation—At time of making contract will not affect minor's liability.

V

VAN PATTEN, CILLEY v., ... 80

VERHAGE, WINGARDEN v., ... 14

Digitized by Google

W

PAGE

WALLACE v. BAHLHORN, ... 87

Lease—For one year, with privilege of eight years, with reservation of right to sell the whole or part of leased premises, is terminated by such sale.

WATSON, HURLEY v., ... 531

WAYNE CIRCUIT JUDGES, LANGTRY v., ... 451

WAYNE COUNTY SAVINGS BANK, MUTUAL BENEFIT LIFE INSURANCE CO. v., ... 116

WELCHER, COX v., ... 263

WHITAKER v. GRUMMOND, ... 249

Corporation—Directors have power, generally, to compromise corporate debts—May accept part of a stock subscription where there is doubt as to the liability of the subscriber for the whole—Such a compromise, while subject to the rights of creditors, is binding on the corporation—And on the stockholders of a new company organized by those of the first one, who made an even exchange of their stock, including said subscriber, who subscribed on the basis of said compromise, with the full knowledge of the remaining stockholders.

WHITE v. NEWHALL, ... 641

Subrogation—Party loaning money to mortgagor to pay mortgage under promise of security on the land will be subrogated to rights of mortgagee to the extent of money furnished and interest.

WHITE, PEOPLE v., ... 648

WHITE, ROGERS v., ... 10

WILLIS AVENUE, IN RE, ... 635

WINCHELL v. CLARK, ... 64

Water-rights—May be severed from particular portion of land by the owner—Nuisance—Unlawful flowing of land, and consequent injury to the water-rights of the owner, is a nuisance—Abatement of by removal of dam will not make him liable as a trespasser.

WINGARDEN v. VERHAGE, ... 14

Copartnership accounting.

Digitized by Google

PAGE

WITHERAL v. MUSKEGON BOOMING CO., ... 48

Logs and logging--Negligence—Evidence that logs run by defendant jamed below plaintiff's land, and that defendant ran logs against the jam until it extended above said land, where it remained for a month, makes out a *prima facie* case of negligence—Not necessary for plaintiff to negative the exercise of reasonable care by defendant, or to specify in what respect its employés were negligent—Title—Of vendee in possession under paid-up land contract, and entitled to deed, is sufficient to enable him to recover for hay destroyed by flooding the land—Clause in contract giving vendor half the proceeds of hay raised on the land means half of its money value—Title to hay remains in vendee—Evidence—Of value of hay cut preceding year admissible to show capacity of land to produce hay—Destruction of pasturage is *prima facie* evidence of damage to amount of its value—Log-owner—Has right to use stream in its natural capacity, and so as not to form jams, or otherwise cause overflowing of adjoining lands to a greater extent than if logs were allowed to float down unaided by artificial means—Muskegon river—Has well-defined channel—Low or bottom lands, which are overflowed in times of high water, not within its boundaries—Capacity of stream cannot be increased by artificial means so as to utilize at all times its full flowage during unusual and brief freshets—Navigation—Public right of measured by capacity of stream for valuable public use in its natural condition—Any attempt to create capacity at the expense of private interests only justifiable on an assessment and payment of compensation.

WOODWORTH, BURCH v., ... 519

WROUGHT IRON BRIDGE CO. v. TOWNSHIP OF JASPER, . . . 441

Township-line road—On allotment under the statute, each township becomes liable to keep its portion in repair—Neither can legally obligate itself to aid the other in building a bridge forming a part of the portion of said highway not allotted to it—Ratification—Township cannot ratify a contract it could not legally make in the first instance.

Digitized by Google

Z

PAGE

ZABEL v. HARSHMAN, ... 270

Equity practice—Separate hearing on demurrer clause in answer should not be permitted—Bill held to make a case for equitable relief, the remedy at law being inadequate and fraud being charged.

ZABEL v. HARSHMAN, ... 273

Township drain commissioner—Has no power to locate drain on line of one laid by county drain commissioners, unless vacated or abandoned—County drain commissioners—If officers *de facto*, action as such within the authority conferred upon such officers is not open to collateral attack—Appointment of, by board of supervisors of which they are members, questioned—Release or condemnation of right of way, and ascertainment of compensation, if damages not released, essential to legal construction of drain by township drain commissioner—Who must recognize as legally established a county drain constructed under color of the statute, and acquiesced in for 15 years or more.

ZINK v. BOARD OF SUPERVISORS OF MONROE CO., ... 283

Township drain commissioner—Has no power to employ legal assistance in the performance of his official duties—If clerical assistance is secured, the necessity therefor must appear, and the charges be brought within the statutory limits—In the absence of such showing, such charges are properly rejected by the board of supervisors.

98 CASES.

Digitized by Google

MICHIGAN CASES CITED.

A

PAGE

Allor v. Wayne County Auditors, 43 Mich. 76 ..... 580, 589
Anderson v. Boom Co., 61 Mich. 489 58
Anderson v. Hill, 54 Mich. 477 629
Anderson v. Walter, 34 Mich. 113 132
Atkinson v. Morse, 63 Mich. 276 ..... 320, 322
Attorney Gen. v. Detroit Common Council, 58 Mich. 213 579
Auditor General v. Monroe, 36 Mich. 75 219

B

Babcock v. Hanselman, 56 Mich. 27 329
Barnes v. Brown, 52 Mich. 153 127
Batterson v. Railway Co., 49 Mich. 184 140
Batterson v. Railway Co., 53 Mich. 125 141
Bauman v. Boom Co., 66 Mich. 544 58
Bay City v. State Treasurer, 23 Mich. 499 629
Beebe v. Knapp, 28 Mich. 53 422
Benjamin v. Improvement Co., 42 Mich. 628 629
Benson v. Morgan, 50 Mich. 77 132
Borland v. Kingsbury, 65 Mich. 59 453
Bostwick v. Mahaffy, 48 Mich. 342 131
Bray v. Bray, 30 Mich. 479 35
Brigham v. Fawcett, 42 Mich. 542 164
Brion v. Kennedy, 47 Mich. 499 434
Bronson v. Green, Walk. Ch. 56 310
Brown v. Weightman, 62 Mich. 557 100
Buell v. Irwin, 24 Mich. 145 12
Buhler v. Jennings, 49 Mich. 538 127
Burrell v. Salt Co., 14 Mich. 34 322
Burton v. Schildbach, 45 Mich. 504 433

C

PAGE

Carley v. Fox, 38 Mich. 387 127
Case v. Dean, 16 Mich. 12 13
Cass v. Gunnison, 58 Mich. 106-116 ..... 148, 149, 151
Cayuga Bank v. Purdy, 56 Mich. 6 289
Chambers v. Hill, 34 Mich. 523, 525 143
Chapman v. Colby, 47 Mich. 51 310
City of Detroit v. Beecher, 69 Mich. 15 638
City of Detro t v. Daly, 68 Mich. 503 638
City of Detroit v. Heintz, 69 Mich. 167 638
City of Detroit v. Ledyard, 69 Mich. 166 638
City of Detroit v. Sauer, 69 Mich. 164 638
Clay v. Grand Rapids, 60 Mich. 451 509
Clay v. Improvement Co., 34 Mich. 207 14
Conrad v. Long, 33 Mich. 78 156
Cook v. Rounds, 69 Mich. 310 516
Coops v. Railway Co., 66 Mich. 448 94
Crittenden v. Insurance Co., 41 Mich. 442 131
Curran v. Norris, 58 Mich. 512 327

D

Daniells v. Watertown Tp., 61 Mich. 514 219
Daniels v. Clegg, 28 Mich. 40 94
Davis v. Burgess, 54 Mich. 514 575
Davis v. Zimmerman, 40 Mich. 24 131
Dayton v. Monroe, 47 Mich. 194 414
Deitz v. Groesbeck, 32 Mich. 308 86
Denison v. Smith, 33 Mich. 155 206
Detroit v. Board of Public Works, 23 Mich. 546 327

Digitized by Google

PAGE

Detroit Sharpshooters' Ass'n v. Highway Commissioners, 34 Mich. 38..... 19
De Vries v. Conklin, 22 Mich. 255... 126
Doran v. De Long, 48 Mich. 552..... 327
Doran v. Phillips, 47 Mich. 230..... 575
Downey v. Andrus, 43 Mich. 65..... 260
Downey v. Hendrie, 46 Mich. 501... 94
Drennan v. People, 10 Mich. 169.... 575
Drennan v. People, 10 Mich. 183-4, ... 481, 486
Dudgeon v. Haggart, 17 Mich. 273.. 310
Dullam v. Willson, 53 Mich. 392.... 555
Dupont v. Highway Commissioners, 28 Mich. 362..... 19

E

Eberts v. Selover, 44 Mich. 519..... 310
Ecliff v. Railway Co., 64 Mich. 196..... 94
Edwards v. McEnhill, 51 Mich. 160..... 127
Edwards v. Nelson, 51 Mich. 121.... 100
Ellis v. Secor, 31 Mich. 185..... 131
Emery v. Lord, 26 Mich. 431..... 127

F

Farwell v. Fox, 18 Mich. 166.... 205, 206
Finn v. Haynes, 37 Mich. 65..... 219
First National Bank v. Deal, 55 Mich. 592..... 132
Fisher v. People, 20 Mich. 135..... 297
Frazee's Case, 63 Mich. 396..... 556

G

Galloway v. Corbitt, 52 Mich. 460... 479
Gamble v. Horr, 40 Mich. 561..... 12
Gantz v. Toles, 40 Mich. 725..... 127
Gibbs v. Linabury, 22 Mich. 479.... 132
Goodrich v. Hubbard, 51 Mich. 62.. 323
Grand Rapids Booming Co. v. Jarvis, 30 Mich. 327, 308.....52, 58
Grove v. Wise, 39 Mich. 161..... 35

H

Hall v. City of Ionia, 38 Mich. 493, 498, 499..... 72
Hall v. Kellogg, 16 Mich. 135..... 12
Hall v. People, 43 Mich. 417..... 482
Hargreaves v. Deacon, 25 Mich. 1.. 94
Harrett v. Kinney, 44 Mich. 457..... 156
Harrison v. Metz, 17 Mich. 377..... 219
Harvey v. Galloway, 34 Mich. 531... 172

PAGE

Hassenyer v. Railroad Co., 48 Mich. 209..... 94
Hibbard v. People, 4 Mich. 125..... 557
Hillman v. Schwenk, 68 Mich. 293, 297 .....300, 302
Hubbard v. Springwells, 25 Mich. 153..... 629
Hunt v. Eaton, 55 Mich. 362..... 159

I

In re Brown, 45 Mich. 326 352
In re Storick, 64 Mich. 685..... 352

J

Jeffery v. Hursh, 43 Mich. 563..... 179
Jeffery v. Hursh, 45 Mich. 59..... 179
Jeffery v. Hursh, 49 Mich. 31..... 179
Jeffery v. Hursh, 58 Mich. 246 179
Jenne v. Marble, 37 Mich. 319..... 127
Jhons v. People, 25 Mich. 499..... 327
Johnson v. Sutherland, 39 Mich. 579..... 127

K

Kelso v. Saxton, 40 Mich. 666..... 205
Kenton Ins. Co. v. McClellan, 43 Mich. 564, 565.....127, 132
Kinney v. Tabor, 62 Mich. 517..... 245
Kitchell v. Mudgett, 37 Mich. 81.... 127
Knowles v. People, 15 Mich. 409.... 297
Kroop v. Forman, 31 Mich. 144.... .....14, 630, 631

L

Lacey v. Davis, 4 Mich. 140..... 12
La Roe v. Freeland, 8 Mich. 531, 534..... 187
Larson v. Jensen, 53 Mich. 427..... 101
Latham v. Udell, 38 Mich. 238..... 131
Lindstrand v. Delta Lumber Co., 65 Mich. 254..... 261
Log Co. v. Nelson, 45 Mich. 578..... 58
Loud v. Campbell, 28 Mich. 239..... 322

M

Manley v. Saunders, 27 Mich. 348... 131
Marthinson v. North British & Mercantile Ins. Co., 64 Mich. 372 .....463, 466
Maxwell v. Paine, 53 Mich. 31..... 12
Maynard v. Vinton, 59 Mich. 155.... 115
McFarlane v. Ray, 14 Mich. 465..... 12

Digitized by Google

PAGE

M'Hardy v. Wadsworth, 8 Mich. 349 142
McKibbin v. Barton, 1 Mich. 213 548
McLean v. Barton, Har. Ch. 287, 288 230
McLellan v. Detroit File Works, 56 Mich. 582 624
Mich., Midland, etc., R. R. Co. v. Bacon, 33 Mich. 466 114
Millar v. Cuddy, 43 Mich. 274 210
Miller v. Grandy, 13 Mich. 540 292
Mills v. Spencer, 3 Mich. 127, 136 104
Minock v. Shortridge, 21 Mich. 304 187
Moetter v. Highway Commissioner, 39 Mich. 726 19
Moser v. White, 29 Mich. 59 13

N

Names v. Commissioners of Highways, 30 Mich. 490 19
N. Y. Iron Mine v. Citizens' Bank, 44 Mich. 352 397
Norris v. Showerman, Walk. Ch. 206 103
North v. Joslin, 59 Mich. 647 354

O

O'Rourke v. O'Rourke, 43 Mich. 58 297

P

Paddack v. Pardee, 1 Mich. 421 108
Parker v. Armstrong, 55 Mich. 176 421
Paterson v. Parsell, 38 Mich. 607 206
People v. Auditor General, 12 Mich. 171 662
People v. Burt, 51 Mich. 199 575
People v. Calvin, 60 Mich. 113 502
People v. Common Council, 29 Mich. 108 576
People v. Connor, 13 Mich. 238 328
People v. Detroit, 18 Mich. 338 327
People v. Doesburg, 16 Mich. 133 328
People v. Gallagher, 4 Mich. 244 576
People v. Gardner, 62 Mich. 307 ..... 651, 654
People v. Haley, 48 Mich. 495 575
People v. Hartwell, 12 Mich. 508 328
People v. Highway Commissioners, 14 Mich. 528 19
People v. Highway Commissioners, 16 Mich. 64 19

PAGE

People v. Hobson, 48 Mich. 28 479
People v. Husted, 52 Mich. 624 482
People v. Jenness, 5 Mich. 305 297
People v. Jones, 43 Mich. 554 651
People v. Jones, 49 Mich. 591 502
People v. Jones, 49 Mich. 594 501
People v. Knight, 13 Mich. 230 328
People v. Mahaney, 13 Mich. 481 ..... 576, 579, 589
People v. Miller, 16 Mich. 205 328
People v. Molitor, 23 Mich. 341 328
People v. O'Brien, 60 Mich. 8 469
People v. Pline, 61 Mich. 247 651
People v. Pratt, 14 Mich. 333 328
People v. Pratt, 15 Mich. 184 328
People v. Salem, 20 Mich. 452 629
People v. Shufelt, 61 Mich. 237 479
People v. Town, 53 Mich. 488 502
People v. Township Board of Scio, 3 Mich. 121 19
Petrie v. Lane, 67 Mich. 454 319
Plank-road Co. v. Fisher, 4 Mich. 43 269
Platt v. Highway Commissioner, 38 Mich. 247 19
Powers Appeal, 29 Mich. 404 13
Powers v. Harlow, 53 Mich. 515 ..... 94, 95
Powers v. Russell, 26 Mich. 179 127
Prout v. Wiley, 28 Mich. 164 187

Q

Quinn v. Heisel, 40 Mich. 576 575

R

Railway Co. v. Bohn, 27 Mich. 503 94
Railway Co. v. Smith, 46 Mich. 504 94
Rawson v. McElvaine, 49 Mich. 194 479
Reed v. Buys, 44 Mich. 80 ..... 127, 132
Rhead v. Hounson, 46 Mich. 246 548
Richards v. Proper, 44 Mich. 96 127
Rickle v. Dow, 39 Mich. 91 127
Riggs v. Sterling, 60 Mich. 643 610
Rood v. Jones, 1 Doug. 188 184
Ross v. Griffin, 53 Mich. 8 495
Ross v. Highway Commissioners, 32 Mich. 301 19
Ross v. Leggett, 61 Mich. 445 575
Ross v. Walker, 31 Mich. 120 127
Russell v. Bank, 39 Mich 671 127
Ryder v. Flanders, 30 Mich. 336 156
Ryerson v. Utley, 16 Mich. 269 629

Digitized by Google

S

PAGE

Sanford v. Huxford, 38 Mich. 318... 184
Schlatterer v. Nickodemus, 51 Mich. 625, 626.....132, 127
Scriven v. Hursh, 39 Mich. 98...178, 180
Sexton v. McDowd, 38 Mich. 148.... 205
Sharp v. Township of Evergreen, 67 Mich. 443..... 449
Sheldon v. Holmes, 58 Mich. 138.... 47
Shoemaker v. Gardner, 19 Mich. 96 606
Shook v. Proctor, 27 Mich. 349..... 131
Silsbee v. Stockle, 44 Mich. 561..... 12
Singer Manufacturing Co. v. Haynes, 36 Mich. 385..... 310
Smith v. Auditor General, 20 Mich. 405 219
Smith v. Davidson, 40 Mich. 638.... 230
Smith v. Van Blarcom, 45 Mich. 371 310
Snyder v. Willey, 33 Mich. 490, 496 .....144, 462
Stevens v. Osman, 1 Mich. 92..... 206
Stockton v. Williams, 1 Doug. 565.. 227
Stone v. Covell, 29 Mich. 359..... 142
Stowell v. Stowell, 45 Mich. 364..... 114
Strohauer v. Voltz, 42 Mich. 447.... 27
Sutherland v. Carter, 52 Mich. 471.. 35
Sutton v. Beckwith, 68 Mich. 308 .....290, 458
Sutton v. Beckwith, 68 Mich. 310.... 400
Swartwout v. Mich. Air Line R. R. Co., 24 Mich. 389..... 114

T

Tabor v. Insurance Co., 44 Mich. 324 132
Taff v. Hosmer, 14 Mich. 255..... 352
Taylor v. Soper, 53 Mich. 96..... 258
Taymouth Tp. v. Koehler, 35 Mich. 22 14
Thatcher v. St. Andrew's Church, 37 Mich. 264.....131, 389

PAGE

Thomas v. Port Huron, 27 Mich. 320..... 629
Thunder Bay R. Booming Co. v. Speechly, 31 Mich. 344..... 58
Tomlin v. Newcomb, 70 Mich.——.. 275
Tompkins v. Hollister, 60 Mich. 470..... 139
Tompkins v. Hollister, 60 Mich. 479..... 128
Toms v. Williams, 41 Mich. 552, 561 .....369, 370, 371
Tower v. Detroit, L. & L. M. R. R. Co., 34 Mich. 328..... 114
Tyler v. Peatt, 30 Mich. 65.....548

V

Van Auken v. Highway Commissioner, 27 Mich. 415..... 19
Vary v. Shea, 36 Mich. 388..... 103

W

Ward v. Ward, 37 Mich. 259..... 144
Wattles v. Dubois, 67 Mich. 313..... 205
Wattles v. Lapeer, 40 Mich. 624..... 12
Way's Case, 41 Mich. 304..... 575
Webb v. Mann, 3 Mich. 139..... 35
Wells v. Elsam, 40 Mich. 218..... 245
Wells v. Rogers, 44 Mich. 411..... 255
Wells v. Rogers, 50 Mich. 294..... 255
West v. Laraway, 28 Mich. 466..... 126
Whiting v. Butler, 29 Mich. 122..... 156
Wilson v. Arnold, 5 Mich. 98..... 206
Wilson v. Coolidge, 42 Mich. 112.... 127
Wilson v. Odell, 58 Mich. 533, 536 .....369, 370, 371
Wood Reaping, etc., Co. v. Smith, 50 Mich. 569..... 105

Y

Young v. Kelsey, 46 Mich. 414..... 479
Young v. McKee, 13 Mich. 554..... 131
Young v. Stephens, 9 Mich. 507..... 144

Digitized by Google

JANUARY TERM, 1888.*

SIDSEL JOHNSON v. GEORGE R. FOWLER.

Partnership—Dissolution and accounting—Equitable lien—Payment of partnership debts—Specific performance of agreement to convey joint property to one copartner.[1]

This case involves questions arising upon the dissolution of a copartnership and an accounting between the parties, one of whom was obligated to convey the joint property to the other upon payment of one-half of the agreed value of the land, and of the improvements made thereon; and a statement of the points decided involves an abstract of the opinion, to which reference is had.

Appeal from Manistee. (Judkins, J.) Argued November 8, 1887. Decided January 5, 1888.

Bill filed to dissolve a partnership, and for an accounting, and the specific performance of the partnership agreement as to the conveyance of the joint real estate. Defendant appeals. Decree affirmed in part and reversed in part, and case remanded for further accounting, and the entry of a final decree in accordance with the opinion. The facts are stated in the opinion.

D. S. Harley and *A. J. Dovel*, for complainant.

P. W. Niskern (*S. W. Fowler*, of counsel), for defendant.

CHAMPLIN, J. Complainant filed her bill to dissolve a partnership, for an accounting and settlement of the partnership transactions, and for a specific performance of an agreement entered into between the parties as follows:

* Continued from Vol. 67.
[1] For full digest of points decided, see *Table of Cases Reported.*

Digitized by Google

"This agreement, made this third day of September, A. D. 1884, by and between George R. Fowler, of the township and county of Manistee, State of Michigan, party of the first part, and Mrs. Sidsel Johnson, of the city and county of Manistee and State of Michigan, party of the second part, witnesseth:

"That whereas, said George R. Fowler is the owner in fee and is possessed of all that part of lot five (5) of section thirty-six (36) of township twenty-two (22) north, of range seventeen (17) west, in said township and county of Manistee, State of Michigan, lying and being south of the Allegan, Muskegon and Traverse Bay State road, excepting such parts thereof as he may heretofore have deeded away. The said premises, now belonging to said George R. Fowler, consist of a strip of land on the south side of said State road, one hundred feet wide and extending eighty rods along said State road, and bounded on the south by land of the Manistee Railroad Company, and extending easterly from said one hundred-feet strip eighty rods to the section line; thence south along said section line to the waters of the Manistee lake or river; thence westerly along said waters and the lands of said railroad company; thence northerly to said Allegan, Muskegon and Traverse Bay State road; all being part of said lot five of section thirty-six (36) aforesaid.

"Now, it is hereby mutually agreed by and between the parties aforesaid that a part of said one hundred-feet strip of land, to wit: Beginning ten (10) feet east of the small house thereon, now occupied by William Crew, and running thence easterly along the Allegan, Muskegon and Traverse Bay State road, where the same is now traveled, four hundred feet, being a parcel of land one hundred feet wide and four hundred long, lying and being along said State road, and part of said lot five (5) of section thirty-six (36) of township twenty-two (22) north, of range seventeen (17) west, in said county of Manistee,—shall be, and the same is hereby, set off, and, for the purposes of this contract, the same is valued at the sum of eight hundred dollars ($800).

"The said Geo. R. Fowler and said Mrs. Sidsel Johnson agree to build upon said 100 by 400 feet lot a dwelling-house suitable for a hotel, boarding house, and saloon; also a barn, to be used in connection therewith, and such other out-buildings, fences, and improvements as may be desirable or necessary in connection with the business to be carried on on said premises.

"Each party shall pay one-half of all the expenses of such

Digitized by Google

buildings and improvements, and shall advance the money for the same as needed in the course of building and improving, so that the expenses may be paid as they accrue. Said Sidsel Johnson, with her family, is to occupy said buildings and the premises, and shall manage the business there to be carried on.

"Her husband may act for her in all matters pertaining to this agreement. Said Geo. R. Fowler and said Mrs. Sidsel Johnson shall jointly pay all the expenses of said business, and shall each pay one-half of all such expenses and of all losses that may accrue, and each shall have and receive one-half of the net profits of all business conducted upon said premises.

"Correct books of account shall be kept of all business there transacted, and such books shall be opened to the examination of each partner at any reasonable time.

"Whenever said Mrs. Sidsel Johnson shall pay said George R. Fowler the sum of four hundred dollars, being one-half of the price of said 100 by 400 feet lot of land, then said George R. Fowler and his wife shall deed and convey to said Mrs. Sidsel Johnson, her heirs and assigns, the undivided one-half of said premises, and thereupon said George R. Fowler and said Mrs. Sidsel Johnson shall be tenants in common of said premises, with all the buildings and improvements thereon; and whenever said Mrs. Sidsel Johnson shall pay said George R. Fowler the further sum of four hundred dollars, being the balance of the purchase money for said 100 by 400 feet lot of land, and shall also in addition thereto refund and pay to said George R. Fowler all the money which he may have invested in the buildings and improvements of said lot, then said George R. Fowler and his wife shall convey said premises, with all the buildings and improvements thereon, by a good warranty deed, to said Mrs. Sidsel Johnson, her heirs and assigns, forever; and thereupon said Mrs. Sidsel Johnson shall be the sole owner of said premises in fee simple.

"All the remainder of the premises described in the preamble to this agreement, and not included in said 100 by 400 feet lot of land, shall be cultivated, fenced, and improved by said parties jointly, each paying one-half of the expense thereof, and each to have and receive one-half of the crops and produce raised thereon, together with one-half of all the fruit that may grow thereon.

"If any crop is raised by either party at his sole expense, he or she shall have the whole of such crop.

"This agreement to be and continue for the term of fifteen

Digitized by Google

years from the date hereof, unless said George R. Fowler should sell or convey any part of the land last mentioned, and then, as to the part sold or conveyed, this agreement to terminate, saving and reserving to each his or her share in the crops then growing thereon.

"The said parties shall come to a full accounting and settlement twice a year, to wit: on the first day of January and the first day of July; and if either shall have put into the buildings, improvements, and cultivation of the premises more than his or her share, he or she shall have interest on the excess over his or her share at the rate of seven per cent. per annum, but neither party shall have any compensation for the personal services of himself or herself, nor for the services of the husband of said Mrs. Sidsel Johnson.

"All taxes assessed upon said premises while the same are in the joint occupation of said parties shall be paid equally by said parties, share and share alike.

"In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

"Signed, sealed, and delivered
in the presence of GEORGE R. FOWLER. [Seal.]
"D. S. HARLEY, SIDSEL JOHNSON. [Seal.]
"ANDREW JOHNSON."

Proofs were taken in open court, and a decree was entered as follows:

"At a session of said court, held at the court-house in the city and county of Manistee, on the sixteenth day of December in the year 1886.

"Present, Hon. J. BYRON JUDKINS, Circuit Judge.

"This cause came on to be heard at this term of said court upon the pleadings of the parties and the proofs taken in open court, and was argued by the counsel for the respective parties, and, mature deliberation being had thereon, it appears to the court:

"That on the fourth day February, in the year one thousand eight hundred and eighty-seven, the same being the date of this decree, there is due from the complainant to the defendant the sum of two thousand dollars, in full of all his just demands against the complainant, which sum includes the purchase price of the lot of land hereinafter described; also the money invested by the defendant in buildings and improvements made upon said premises; also his share of the net profits of the business carried on for the joint account of

Digitized by Google

the complainant and defendant, together with all allowance of interest justly due to the defendant; and also all other just demands of said defendant against the complainant.

"That upon the payment by the complainant to the defendant of the sum of two thousand dollars, with interest thereon at the rate of seven per cent. per annum, to be computed from the date of this decree, the complainant is entitled to have a legal title in fee simple of said premises, clear of all incumbrances placed thereon by the defendant.

"That the business carried on upon said premises for the joint account of the parties to this suit came to an end on the first day of May, in the year one thousand eight hundred and eighty-six, and that the joint business or copartnership relation between said parties should be held as dissolved upon said first day of May, in the year 1886.

"Therefore, on motion of A. J. Dovel and D. S. Harley, solicitors for the complainant, it is ordered, adjudged, and decreed that within ninety days from the date of this decree the said defendant shall cause to be removed from said premises all incumbrances by him at any time placed thereon, and the defendant and his wife shall execute their deed, and duly acknowledge the same, conveying said premises to the complainant, her heirs and assigns, forever, with the usual covenants of warranty, and that upon the complainant paying, or causing to be paid, to the defendant, the sum of two thousand dollars, with the interest thereon at seven per cent. per annum computed from the date of this decree, the defendant shall deliver such deed to the complainant, and thereby she shall be vested in fee simple of said premises, such payment to be made within ninety days from the date of this decree.

"The premises above referred to, and to be conveyed under the provisions of this decree, are described as follows, to wit: Beginning ten (10) feet east of the small house on the south side of the Allegan, Muskegon and Traverse Bay State road, lately occupied by William Crew, and running thence easterly along said State road for four hundred feet, where the said State road was traveled on the third day of September, in the year 1884, the same being the date of the written agreement between the parties to this suit, being a rectangular parcel of land one hundred feet wide and four hundred feet long, lying and being on the south side of said State road, and part of lot five (5) of section thirty-six (36) of township twenty-two (22) north, of range seventeen (17) west, in the county of Manistee and State of Michigan. The point of beginning above

Digitized by Google

mentioned is one hundred and fifty-nine feet easterly along the south line of said State road from the point where the west line of said lot five intersects the south line of said State road, as shown by the evidence in this suit.

"It is further ordered, adjudged, and decreed that if the complainant shall pay or tender to the defendant, within the time above limited, the sum of two thousand dollars, with interest thereon as aforesaid, and the defendant shall neglect or refuse to deliver such deed of said premises to the complainant, then this decree shall stand in place of such deed, conveying the above-described premises to the complainant, her heirs and assigns, forever, and the same may be recorded as such conveyance; and if the complainant, within ninety days from the date of this decree, shall neglect or refuse to pay or tender to the defendant the sum of two thousand dollars with the interest thereon, as aforesaid, then the said premises shall be sold at public sale to the highest bidder, upon such notice and in like manner as sales upon the foreclosure of mortgages under the decree of this court, and the proceeds of such sale shall be deposited with the register of this court, to be divided between the parties of this suit as their respective interests shall be made to appear to this court, under the further decree of this court to be made in the premises.

"It is further ordered, adjudged, and decreed that the complainant shall assume, pay, and discharge all indebtedness incurred on account of the buildings and improvements made upon said premises, and in the course of the business carried on for the joint benefit of the parties to this suit, and that such joint business shall be held to have terminated on the first day of May, in the year one thousand eight hundred and eighty-six, and that the copartnership between the complainant and the defendant be and the same is hereby dissolved.

"Each party to this suit shall pay his or her own costs and expenses of this suit, and neither party shall recover any costs of suit from the other.

"(Signed) J. BYRON JUDKINS,
"(Countersigned) Circuit Judge.
"J. P. BAXTER, Register.
"*Dated the fourth day of February*, A. D. 1887."

The testimony as to the amounts put into the concern by the respective parties is not very satisfactory, and we are not

Digitized by Google

disposed to change the result arrived at by the court below so far as the court went.

The agreement under which these parties operated constituted them partners in the venture, with an option to complainant to become a half owner and tenant in common of the land, and the still further option of becoming the sole owner, by complying with the requirements of the contract. The complainant asks for a dissolution of the partnership, and an accounting, and at the same time signifies her election to purchase the whole land, and become the sole owner thereof. To entitle her to do so, she must pay, in addition to the agreed price, all the money which defendant has invested in the buildings and improvements of the land. For this sum defendant would be entitled to an equitable lien as vendor, since it was contemplated that the purchase price should include the moneys invested for improvements as well as the contract price of the land.

It appears by complainant's showing that the entire net profits arising from the partnership business were by her applied in payment for improvements upon the land,—that is, in building the house and barn; and this appears to have been done without the knowledge or consent of defendant. No part of such net profits have been paid over to defendant, and no money appears to be on hand representing such profit, and no partnership assets of any account appear to remain. It follows that one-half of the profits thus applied belongs to defendant, and, as a consequence, his lien would cover his share of the moneys so invested.

In so far as the decree proceeds upon the ground that defendant has an equitable lien for the amount found due defendant, and authorizing a sale as in ordinary mortgage cases to satisfy the same, it is correct, although it should authorize the defendant to bid at the sale, and become the purchaser thereof, and it should provide for the payment of any surplus to complainant. But it is erroneous in directing

Digitized by Google

the moneys arising from the sale to be paid into court, to be divided between the parties as their respective interests may appear.

The money received from such sale must be applied to the payment of the amount due defendant, and the costs and expenses of the sale, and, if there be any surplus, it must be paid to complainant.

Complainant has no ownership or title in the land until she has paid the purchase price, or, in other words, the amount due defendant; neither has she any right to the moneys realized from the sale until after such amount is paid.

It appears from the testimony that certain indebtedness incurred by these parties in making the improvements contemplated by the contract has not been paid, but is still outstanding, and also that certain partnership debts have not been paid; and the decree declares that complainant shall assume, pay, and discharge all indebtedness of these kinds. But the amounts are not ascertained, so far as I can find from the proofs; and it is difficult to see how this decree protects defendant from liability, unless they were ascertained and included in the amount found due and payable to him.

Counsel for complainant in their brief say:

"The evidence shows that there is some outstanding indebtedness incurred in the course of building, and also in the business, but the full extent of the liabilities is not shown, and became immaterial upon complainant assuming all the debts."

We do not think it became immaterial. The assumption of the debts and the paying them are quite different things. Assuming the debts by complainant does not discharge defendant from liability to the creditor. He is not obliged to take the personal responsibility of the party, whether such party be financially responsible or not, for his indemnity.

Digitized by Google

These debts must be ascertained, and complainant must pay them within 90 days from the date of the final decree, which will be made after the further accounting is made and filed, and the payment thereof will be made a condition precedent to her right to demand or receive the deed of conveyance of said premises.

Complainant will also have 90 days from said final decree in which to make payment of the amount found due by the circuit court, with interest from the date of that decree, namely, the sixteenth day of December, A. D. 1886; and in default of paying said sum in said 90 days, and the aforesaid indebtedness, all and singular the premises described in the decree shall be advertised and sold in the same manner as lands are sold under a decree for foreclosure; and the parties shall be at liberty to bid at such sale; and the surplus, if any, shall be paid over to complainant, after paying expenses and costs of sale.

A decree will be entered here affirming the decree of the court below as to the dissolution of the partnership, as to the amount found due from complainant to defendant, and as to description of the land to be conveyed, and reversing it as to the residue, and remanding the cause to the circuit court for the county of Manistee, with directions to conclude the accounting by ascertaining the unpaid indebtedness, and to whom owing, and thereupon to enter a final decree in accordance with this opinion, embracing in said decree the usual provisions contained in decrees upon foreclosure of mortgages. The defendant will recover his costs in this Court.

SHERWOOD, C. J., and MORSE, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68a 10
96 158
68 10
149 399

SAMUEL ROGERS v. ELBRIDGE WHITE.

Taxes—Ejectment—Evidence—Right to question validity of tax title—Unauthorized levy—Void sale.

1. A *non-owner*, but in *peaceable* possession, of land, conveyed it by warranty deed, and his grantee succeeded to *such* possession, and held *it* at the time of the commencement of an ejectment suit against him by the owner of tax titles, after which defendant's grantor acquired the *original* government title.

   Held, that the defendant could contest the validity of said tax titles.[1]

2. An excess of $25 in the township tax legally assessable for a given year will invalidate the sale of land upon which any portion of such excess was levied.[2]

3. Taxes assessed to pay orders drawn by a township clerk for repairing a bridge are illegal, where the record fails to show that any such expenditure was ever authorized by the electors, or township board, or commissioner of highways, or that *that* officer ever determined that the public interests and convenience required the making of such repairs, or that the bridge ought to be built, or that he ever made a personal examination of the same; it further appearing that he never furnished the clerk with the statutory statement of the amount of orders to be drawn for such purpose.

Error to Allegan. (Arnold, J.) Argued November 3 and 4, 1887. Decided January 5, 1888.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

---

[1] How. Stat. § 1166, requires proof by a party questioning the title conveyed by a tax deed that he, or the person through whom he claims title, had title to the land at the time of the sale thereof for non-payment of taxes, or subsequently, acquired from the United States or this State.

In *Gamble v. Horr*, 40 Mich. 565, this section is held not to embrace the case of one who shows a title *prima facie* sufficient under common-law rules; and on page 563 it is held that a person in the peaceable possession and occupancy of premises, who assumes to convey them as owner, must be deemed *prima facie* to have a right to do so.

[2] See *Boyce v. Sebring*, 66 Mich. 212 (head-note 11); *Seymour v. Peters*, 67 Id. 415 (head-note 2).

Digitized by Google

Padgham & Padgham (*Edward Bacon*, of counsel), for appellant.

Howard & Roos, for defendant.

SHERWOOD, C. J. This is an action of ejectment brought by the plaintiff to recover possession of 120 acres of land situate in the county of Allegan.

The plaintiff claims the land in fee, and bases his claim upon two tax titles under conveyances by the Auditor General for the taxes of 1879 and 1880, respectively.

The cause was tried before Judge Arnold, in the Allegan circuit, who found the facts and gave judgment for the defendant. The plaintiff brings error.

The evidence does not appear in the record. The findings were requested by counsel for the plaintiff, and the case is now before us upon the several findings of law and entry of the judgment for the defendant.

I have no doubt but that the defendant's interests in the property were such as to properly enable him to defend by attacking the validity of the plaintiff's tax titles, and show them to be worthless if he could.

Adam White, as appears by the findings in the case, purchased the premises from Chase H. Dickinson on the twenty-first day of January, 1882, and received a warranty deed from him therefor, and entered into immediate possession under his deed; and continued the same until he sold to the defendant by warranty deed, and delivered the possession to the defendant, who has continued in the occupancy and possession of the same to the present time, claiming to be the owner thereof.

It also further appears by the findings that the United States conveyed the land to Marvin Hannahs, who, previous to his death, gave it by his will to his son, George Hannahs, and he, after the commencement of this suit, in 1886, con-

Digitized by Google

veyed the same by quitclaim deed to the defendant's grantor, C. H. Dickinson.

It will be discovered that these conveyances perfected the defendant's chain of title from the government, unless it was broken by the titles of the plaintiff. It was proper to introduce them in evidence. They only furnished the evidence of title existing, and which inured to the benefit of the defendant under these deeds. *Gamble v. Horr*, 40 Mich. 561; *Maxwell v. Paine*, 53 Id. 31 (18 N. W. Rep. 546); *Hall v. Kellogg*, 16 Id. 135; *McFarlane v. Ray*, 14 Id. 465. Under these authorities, the possession found by the court under the claim of title made was sufficient to permit the defendant to make the contest he has in this case.

The validity of the tax deeds is the next question in the case. Under the findings of the court, for the taxes of 1879, it clearly appears that an excess beyond what the law allowed of $25 was raised and collected for township purposes, and the land in question was assessed for its proportionate share thereof, and was sold for such portion of the illegal tax. This was sufficient to invalidate such sale. *Case v. Dean*, 16 Mich. 12; *Lacey v. Davis*, 4 Id. 140; *Buell v. Irwin*, 24 Id. 145; *Wattles v. Lapeer*, 40 Id. 624; *Silsbee v. Stockle*, 44 Id. 561 (7 N. W. Rep. 160, 367). The deed on the sale made for the taxes of 1879 was not much relied upon at the hearing, and we will therefore pass to the other.

It is claimed that the title for the taxes of 1880 is invalid for the following reasons:

1. Because the memorandum offered as the record of the proceedings of the township meeting for the year the assessment was made is so defective that no valid tax can be based upon it.

2. If it shall be held a record for any purpose, and the memorandum presented can be held a record upon which to levy a tax, and regulate the amount thereof, the township tax actually levied is excessive and therefore void.

3. The highway and bridge taxes are placed in the column

Digitized by Google

of township taxes, and it makes void the taxes if they are blended, and in these the excess is $41.60.

4. Because the records of the board of supervisors for the year the taxes were assessed do not show what the equalization of the township taxes was.

5. Because the return of the overseer of highways of delinquent highway taxes is not properly sworn to.

6. Because there is no certificate of the county treasurer to the correctness of the list returned by the township treasurer.

The circuit judge found, as matter of law, that the sum of $41.60 was spread in the column of township taxes for the year 1880, and that the same was illegal and excessive, and the taxes for which the land was sold in 1880 included a proportionate share of such excess, and were void, and that the deed made on such sale is of no effect.

The findings of fact fully sustain the conclusion reached by the circuit judge. The $41.60, it appears from the findings, was the amount of two orders drawn and signed by the clerk of the township and delivered to different parties for repairing a bridge. There is no record that any such expenditure was ever authorized at a township meeting, or by the township board, or by the commissioner of highways. Neither does it appear that any record was ever made of any determination by the commissioner of highways that the public interests and convenience required that any repairs be made to this or any other bridge, or that this or any other bridge ought to be built, or that said commissioner made a personal examination of this or any other bridge, and it appears that the commissioner of highways never furnished the township clerk with the amount of orders drawn, in writing, for the repairing of said bridge, in any form.

Under these findings the application of the law made by the learned circuit judge was irresistible. The authorizing and levying of a tax cannot entirely be done by parol. Cooley, Tax'n, 247; *Moser v. White*, 29 Mich. 59; *Powers'*

Digitized by Google

Appeal, Id. 404; *Taymouth Tp. v. Koehler*, 35 Id. 22; *Clay v. Improvement Co.*, 34 Id. 207; *Kroop v. Forman*, 31 Id. 144; *Doe v. M'Quilkin*, 8 Blackf. 335; *Cardigan v. Page*, 6 N. H. 182, 191; *Furrar v. Fessenden*, 39 Id. 268, 277; *Gearhart v. Dixon*, 1 Penn. St. 224, 228.

There is no occasion for considering the other points of defendant's counsel. This one disposes of plaintiff's case under his title for the taxes of 1880 adversely to him, and the judgment at the circuit must be affirmed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

JAMES WINGARDEN v. JOHN VERHAGE.

Copartnership accounting.

This is a case of copartnership accounting, and involves questions of fact *purely*.

Appeal from Ottawa. (Arnold, J.) Argued November 9, 1887. Decided January 5, 1888.

Bill for partnership accounting. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

J. H. Tatem, for complainant.

P. H. McBride, for defendant.

CHAMPLIN, J. In the spring of 1883 the parties to this suit entered into a copartnership in the purchasing and selling of potatoes. Each party was to devote his time to the business, and the profits and losses were to be shared equally. There was no fixed amount of capital, nor was the partnership name agreed upon. The business of the firm appears to

Digitized by Google

have been transacted in the name of the defendant, who made all the shipments of potatoes and received the pay therefor. The bill is filed to obtain an accounting and settlement of the partnership affairs.

It is impossible to do exact justice between these parties, for the reason that no proper books of account were kept, and there is no means of ascertaining with exactness the cost of the potatoes purchased. It is shown that the parties paid from 35 to 50 cents a bushel; but no account was kept, and there is no way of ascertaining how many bushels were purchased for each price. The complainant testifies that the average profit was 10 cents a bushel, and that there were no losses. The defendant denies this, and shows losses upon the sales of two or three car-loads.

I am satisfied from the testimony that complainant invested all money advanced to him by the defendant in the purchase of potatoes.

Complainant admits the receipt of $192.70, and produces receipts from persons from whom he bought potatoes to the amount of $192.30, besides one of $17.64 for oats he bought for defendant. In accounting for this money advanced him by defendant, he includes a receipt from his brother for potatoes purchased from him, of $89. The complainant testified that he put into the partnership business $82 he had on hand in the first instance, and afterwards the profits on the first car-load sold; $100 avails of a note which he owned; and $50 which he borrowed. He testifies also that he turned the note out to his brother to pay for the potatoes purchased from him. If he did this, he could not have applied the money received from defendant to that purpose. I am satisfied that he is mistaken with reference to investing the avails of the note in the business. From the testimony I am satisfied that he invested in the business $82 which he had in hand at the commencement; that afterwards he put in his share of the net profits of the first car-load sold, amounting,

Digitized by Google

according to the testimony of Mattie Verhage, to $33, and the further sum of $50, which he borrowed for the purpose, making a total capital put in by him, and for which he should be credited, of $165.

The total profits arising from the business testified to by Mattie Verhage amounted to $156.53, to which should be added the profit on last car-load shipped to New Jersey, as testified to by defendant, making a total profit of $181.53. From this should be deducted the losses testified to by Mattie Verhage, amounting to $54.36, and the further loss, testified to by defendant, on fourteen bushels of inferior potatoes, $4.80, and for expenses of team, and trips to Grand Rapids, $7.50; total amount to be deducted, $66.66, leaving net profit of $114.87, one-half of which, $57.43, should be credited to the complainant.

The total amount of money in defendant's hands, and which he should account for and pay over to complainant, was $222.43, which, with interest to the date of the decree in the circuit court, amounted to the sum of $262.46, for which sum the court below entered a decree.

We think this amount is substantially correct, and the decree is affirmed, with costs.

SHERWOOD, C. J., and MORSE, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 17
75 35

MORTIMER PRICE v. WILLIAM STAGRAY, COMMISSIONER OF HIGHWAYS, AND WILLIAM FELKER, CLERK, OF THE TOWNSHIP OF HAMPTON.

Highways—Discontinuance—Jurisdiction of commissioner—Notice of hearing—Adjournment.

1. In proceedings for laying out or discontinuing highways, the record must show *affirmatively* that the requirements of the statute have been complied with, and the *jurisdiction* of the commissioner.
2. When the hearing of an application for the discontinuance of a highway was adjourned by the commissioner for *twenty* days, no action can be legally taken until the *adjourned* day.
3. Ten *full* days' notice must be given of the hearing of an application to discontinue a highway.[1]

Certiorari to highway commissioner to review proceedings discontinuing a highway. Argued November 9, 1887. Proceedings set aside January 5, 1888. The facts are stated in the opinion.

Lindner, Porter & Haffey, for petitioner.

SHERWOOD, C. J. This case is a *certiorari* to the commissioner of highways and the clerk of the township of Hampton, in the county of Bay.

The proceedings we are asked to review were taken by said commissioner for the purpose of discontinuing a certain highway running on the east and west quarter line, between the centers of sections 25 and 26, in said township.

It appears from the record that an application was made to the commissioner to discontinue the highway on the third day of May, 1887. On the seventh day of May, a notice

[1] See *Soller v. Township of Brown*, 67 Mich. 422, and note.

Digitized by Google

was given for the hearing upon said petition on the eighteenth of said month. This notice was addressed to "Mr. Price." Petitioner appeared on that day, at the place appointed for the hearing, and took some objections to the proceedings; and the commissioner announced that the hearing would be adjourned twenty days, within which time new notices would be made and served upon the parties interested. Nothing further appears to have been done until the first day of June, 1887, when the commissioner made and served upon the petitioner the following notice:

"COUNTY OF BAY, TOWNSHIP OF HAMPTON.

"TAKE NOTICE.—

"To Mr. Patrick Bergan, M. F. Price, Peter Van Erp, Michael Engelhartt, John Callahan, Mrs. Linderman, Mary Meagher, Dennis Gallagher, Patrick Toohey, Phillip Webber, and John Carnel:

"You are hereby notified that the undersigned commissioner of highways will meet at the house of Peter Van Erp in said township, at nine o'clock in the forenoon of the sixth of June, 1887, for the purpose of discontinuing the Weber road. WILLIAM STAGRAY,

"Commissioner of Highways for the Township of Hampton.

"*Dated June* 1, 1887."

The return, continuing, gives the following as the final action of the commissioner:

"DISCONTINUING A HIGHWAY.

"To discontinue the highway known and described as follows: Weber road, commencing at a point twenty-five feet and twenty-five hundredths feet (25 and 25-100) north of the center of section twenty-five (25), in town fourteen (14) north, of range five (5) east; thence running in a westerly direction to a point seven feet north of the center of section twenty-six (26), in town fourteen (14) north, of range five (5) east.

"The said highway commissioner did, after due notice, given according to law, proceed on the sixth day of June, 1887, to view the premises described in said application and notice, and ascertain and determine the necessity of discontinuing said highway; and he doth further return that he

Digitized by Google

considers and determines that said described highway shall be, and the same is hereby, discontinued, and that he does not find any damage sustained by said discontinuance.

"Given under my hand this ninth day of June, 1887.

"WILLIAM STAGRAY,

"Commissioner of Highways of the Township of Hampton."

The petitioner claims the proceedings are erroneous for the following reasons:

1. That the commissioner erred in adjourning the hearing for twenty days to give new notices.

2. That, if such adjournment could be had legally, the hearing should have been on the seventh instead of the sixth of June, 1887.

3. That the notice, given for the hearing on the sixth of June, to petitioner was defective and insufficient.

In cases of this kind the record must show affirmatively that the requirements of the statute have been complied with, and that the commissioner has obtained jurisdiction in the matters, in order to sustain his proceedings. *People v. Township Board of Scio*, 3 Mich. 121; *Ross v. Highway Commissioners*, 32 Id. 301; *Moetter v. Highway Commissioner*, 39 Id. 726. Whatever may be thought of the first point made by the petitioner, we think the second and third must prevail. Under the statute, the commissioner could adjourn the hearing but twenty days, and that day should have been upon the seventh of June, and not upon the sixth, as was done in this case. How. Stat. § 1300; *People v. Highway Commissioners*, 16 Mich. 64; *Van Auken v. Highway Commissioners*, 27 Id. 415.

The notice for the sixth of June was the one relied upon by the commissioner, and given on the first day of June. The statute requires ten days' previous notice to be given, which was not done. How. Stat. § 1298; *Platt v. Highway Commissioner*, 38 Mich. 247; *Detroit Sharpshooters Ass'n v. Highway Commissioners*, 34 Id. 38; *People v. Highway Commissioners*, 14 Id. 528; *Dupont v. Highway Commissioners*, 28 Id. 362; *Names v. Commissioners of Highways*, 30 Id. 490.

Digitized by Google

The action of the commissioner must be set aside, and the proceedings quashed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

---

68 20
111 147

JOHN FLYNN v. JASON M. FLYNN.

Deed—Consideration—Evidence—Bill for discharge of mortgage.

1. The *true* consideration of a deed may always be shown where it becomes material to do so. *Strohauer v. Voltz*, 42 Mich. 447.
2. This case involves questions of fact *purely*, and on a review of the testimony the decree of the court below discharging a mortgage held by the defendant on complainant's land is affirmed.

Appeal from Clinton. (Smith, J.) Argued November 9, 1887. Decided January 5, 1888.

Bill filed to rectify a deed so as to express the *true* consideration, and for the discharge of a mortgage. Defendant appeals from a decree granting the relief prayed for. Decree affirmed. The facts are stated in the opinion.

Fedewa & Lyon (*Martha Strickland*, of counsel), for complainant.

Perrins & Baldwin (*O. L. Spaulding*, of counsel), for defendant.

CHAMPLIN, J. The bill of complaint is filed by a father against his son, praying that a certain deed, executed by the father to his son, may be rectified so as to express the true consideration, and that a certain mortgage be decreed paid, and for a discharge thereof from the record.

On the fourteenth day of May, 1879, John Flynn was the

Digitized by Google

owner of the east half of the south-east quarter, and the north-west quarter of the south-east quarter, of section 14, in township 6 north, range 2 west, Michigan, being the town of Olive, Clinton county, Michigan. On that day he executed a mortgage of the premises above described, to secure the payment of a certain promissory note, of even date, for $314.79, on or before three years from the date thereof, with interest at 7 per cent., to R. J. Lounsbury, of Pontiac, Michigan.

The complainant claims that the defendant agreed to pay this mortgage as a consideration for his deeding to his son the east half of the south-east quarter of the section. The deed was drafted, and the consideration expressed therein is one dollar. It is a warranty deed, and contains a covenant against incumbrances.

The defendant claims that the consideration of the deed, as agreed upon at the time, was his promise and undertaking to pay certain indebtedness which his father owed to different persons in Oakland county, amounting to about $200, which he paid, and he says that, in addition to the deed, he was also to have certain personal property, consisting of two cows, one horse, one wagon, one harness, constituting, substantially, all the personal property his father owned, aside from his household furniture. He further testifies that, at the same time the agreement was made to deed the farm to him, he agreed with his father that he should live with his father, in the house upon his father's forty, and they should work both parcels, and that he would pay the aforesaid mortgage out of the proceeds of the crops raised.

He moved into the house with his father, and occupied it, with his wife; his father being the only member of the family living with him, although another son appears to have been there for a time. He put in the land to wheat, and received two-thirds of the crop, giving to his father one-third. The 80-acre tract conveyed to the son was mostly a tamarack

Digitized by Google

swamp, having only from 8 to 10 acres arable land upon it at the time of the conveyance. The father's 40 contained from 20 to 30 acres of tillable land. It appears that, during the first year the parties resided upon the premises, the complainant instigated a quarrel with the defendant's wife, and in consequence left the house, and went to reside with a neighbor. The defendant erected thereafter a house upon his land, but before it was completed the complainant returned, and the parties lived together, without further trouble, until defendant's house was completed, when he removed thereto.

The next season but one, the defendant again worked complainant's land upon shares, dividing the crop, share and share alike. When the mortgage matured, defendant paid the money to the mortgagee, and, instead of taking a discharge, took an assignment to himself, and refuses to discharge the same. He gives as a reason therefor that, instead of permitting him to work the land belonging to his father, so as to obtain the means to pay the mortgage, his father drove him off of the place, and refused to let him work it. He testifies to this, and is corroborated by the testimony of his wife.

I am not satisfied that this excuse is made out. Mrs. Flynn testifies that, except the one time, she had no further trouble with complainant. He came back and resided in the family with defendant and his wife. He had no team or farming implements to work his farm with. The defendant did work complainant's farm afterwards, and it does not seem to me that the statement that his father drove him off the place, and refused to let him work it, is borne out by the testimony.

The testimony shows that the 80-acre tract was worth from $300 to $600, and the personal property from $96 to $160. It does not seem probable that complainant should convey to defendant all this property, upon his undertaking to pay a few debts, less than $200 in amount; especially as Mr. Lounsbury testifies that he considered complainant "financially

Digitized by Google

busted" at the time. It is true that no great reliance can be placed upon complainant's testimony where it is not corroborated. His memory appears to be very defective in regard to his indebtedness at Oakland county, and his whole testimony was indefinite and unsatisfactory. But the testimony of the defendant is not much better. He is quite unable to tell, with three or four exceptions, to whom he paid debts, and the amounts. The debts he does recollect foot up about $160, nearly the same as the value placed upon the personal property by his father.

Samuel W. Smith, the attorney who drew the deed, testifies that the deed was drawn as directed, was read over to John Flynn, and was satisfactory to him. He testifies, further, that Jason M. Flynn was to have this land free and clear, and was to pay certain debts of his father's. He understood at the time that there was a mortgage on the 120 acres of land, and that Jason was to have the 80 acres free and clear from the mortgage, and that he was told so by John Flynn. Mr. Smith undoubtedly testifies candidly to his recollection of the transaction. Nevertheless, in order to reconcile it with the testimony of Jason M. Flynn, the defendant, wherein he testifies that he was to pay the mortgage, but was to have the use of his father's farm to enable him to do so, and that this agreement was made at the same time that the land was agreed to be conveyed, we must conclude that Mr. Smith was not informed of the manner nor by whom the mortgage debt was to be paid, in order to free the land from the incumbrance.

It must be remembered that this was an arrangement between father and son; and, on account of the mutual confidence naturally arising out of that relation, the parties would not be as likely to be so exact, or particular in having all the details and understanding between them stated or reduced to writing, as if the parties did not occupy that relation.

Digitized by Google

Robert J. Lounsbury testified that John Flynn said to him that he was going to deed to Jason 80 acres of the Clinton county farm, and that Jason had paid this claim against the wheat, and had or was to pay certain other claims, and was to furnish him money or the means to move onto the Clinton county farm. He further testified that a deed was made out of the Clinton county farm to Jason, and his recollection is that nothing was said about this 80 acres being subject to this mortgage, but he would not swear positively as to that. In view of Jason's testimony it is clear that he was not informed of the agreement between Jason and his father above referred to.

Abel Haddrill testified that he heard a conversation between these parties in 1879. He says:

"Mr. Flynn told Jason he would deed him 80 acres of land up there if he would pay his debts down here, and give him the privilege of working the whole of it, and living in his [John's] house till he could build a house of his own, and that he would help work the place."

This testimony is consistent with that of Jason, if it includes in "the debts down here" the mortgage debt. Blakeslee's testimony shows that his first conversation with complainant was had before the bargain was made between the parties, and has a bearing only upon the inducement influencing complainant to deed the 80 acres to Jason. He says he heard John say he would like to get his son Jason to go out there and live with him, and didn't want to go alone, and told him that he thought it would be a good thing for him. He further testified that a day or two afterwards John told him that he would deed, or was going to deed, 80 acres of land out there—Clinton county—to Jason, and he was going to live with Jason.

Jason M. Flynn, the defendant, after testifying about some conversation with his father which led up to the agreement, proceeds to state what the agreement was, as follows:

Digitized by Google

"And then he made me an offer that, if I would pay them debts down there for the eighty acres of land, he would let me work his forty, and live on it; he would let me live with him,—live as one family, work with me; I would pay this $314 and some cents on that mortgage, and—well, we talked on that, and I—I think I told him I would do that, providing he would turn me out his horse, cows, and a wagon, and the things he had there to work this land with; to take onto the farm such things as I need on the farm,—what things he had. Well, I didn't want to do it at first; finally I done it; said he would do that; he could help; we would all live together, and work the place; he would give me a good chance, he said, to work the place until I would get my own fixed up,—house on it,—and was able to build a house on it; and I was to work his place, and pay that mortgage for the use of his place, until I was able to build a house on my place.

"*Q.* You say he worked with you?

"*A.* Yes, he worked with me when he was able to work; was to work with me. I was not to pay him for the work; was to live as one family. I was to have the proceeds of the two places, and he was to live on the place with me; him and I together was to work the place, and pay the mortgage off.

"*Q.* Out of what?

"*A.* Off from his place and mine; proceeds of the two places."

He also testifies that the reason he did not carry out the agreement was that the complainant drove him off the place, and refused to let him work it. This is denied by complainant in his testimony.

It appears that defendant did work the place two seasons upon shares, after defendant claims he was driven off, and it does not appear either that complainant worked the place himself, or rented or let it to any other person to work, before the mortgage was paid.

I am not satisfied from the testimony that defendant was driven off the place, or that complainant refused to let him work it. In support of complainant's claim as to the consideration of the conveyance to defendant, is the testimony of

Digitized by Google

Joseph Bates and William M. Stocker, who testify, in substance, that defendant stated to each of them, but not in each other's presence, that John Flynn conveyed the land to him in consideration of his paying this mortgage. Complainant's witnesses Conrad Burkhardt, Henry Schroeimer, and John H. Fedewa support the agreement as stated by the defendant.

If, as defendant states, he considered that he was under no obligation to pay off this mortgage debt, because his father had driven him from his place and refused to let him work it, why did he proceed and pay it? Defendant says he did it to save his own land from a sale under a foreclosure. But this reason is insufficient. The 40 acres covered by the mortgage, and owned by the father, is shown to be worth from $700 to $800. In the case of foreclosure, this parcel the defendant could oblige the mortgagee to sell first, and there can be no doubt that it would have brought enough to satisfy the mortgage debt, and leave defendant's 80 free and clear of the incumbrance. The inference from the fact that he voluntarily took up the mortgage is quite strong that he paid the mortgage debt in pursuance of his agreement.

From the whole testimony, I conclude—

1. That the consideration for the conveyance of the land was, in part at least, that defendant should pay off the mortgage debt, and that he might have the use of both places to enable him to do so.

2. That the complainant has not broken this agreement, or prevented its execution by defendant.

3. That the agreement has been executed by defendant, and the debt paid off by him.

4. That, having paid the debt according to the agreement, he ought to have discharged the mortgage from the records.

5. That by refusing to do so, and asserting it as an existing indebtedness, the mortgage is a cloud upon complainant's title to the forty acres owned by him, which he is entitled to have removed.

The defendant's counsel insist that relief in this case ought to be denied because—

Digitized by Google

1. The allegations in the bill as to a mistake in the deed are not supported by the proofs.

2. That to grant the relief would, in effect, be to reform a contract on a collateral issue, and annex an exception to the covenant against incumbrances, not on parol evidence, but against the balance of parol evidence, and change the contract in writing to an entirely different one.

The counsel very truly say that—

"The covenant against incumbrances is not affected by the testimony as to the consideration."

The bill of complaint prays for a reformation of the deed, so as to express the true consideration; but this was unnecessary, as the true consideration may always be shown where it becomes material to do so, without reforming the deed. *Strohauer v. Voltz*, 42 Mich. 447 (4 N. W. Rep. 161).

It also prays that the mortgage may be decreed paid, and that the same be discharged. This is the important relief asked for, and the bill is properly framed for this purpose. No change is required or necessary in the covenants of the deed. These stand unaffected by the decree asked for, and granted in the court below. The object is to remove the effect of the mortgage as a cloud upon complainant's premises, the mortgage having been paid.

The decree of the circuit court is affirmed, with costs.

SHERWOOD, C. J., and MORSE, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 28
91 487
68 28
s35NW 897
133 407

WILLIAM H. FREEMAN v. RICHARD FREEMAN.

Written contract—Parol testimony to vary or contradict.

A written contract purporting to embody the terms of a settlement by the parties of "*all* matters of difference between them, of whatever name or nature," and *unambiguous* and *complete* in itself, not attacked for *fraud* or *mistake*, and which has been fully performed, cannot be varied by parol testimony.

Error to Clinton. (Smith, J.) Argued November 9, 1887. Decided January 5, 1888.

Debt on judgment. Plaintiff brings error. Reversed. The facts are stated in the opinion.

O. L. Spaulding and *H. & H. E. Walbridge*, for appellant.

Daboll & Brunson, for defendant.

MORSE, J. The parties to this controversy are brothers, residing in the county of Clinton.

The plaintiff sued defendant in the circuit court for that county upon a judgment obtained in the state of New York against the defendant, in favor of Guy H. McMaster and J. Foster Parkhurst. The judgment was rendered September 12, 1876, and assigned to plaintiff May 1, 1886. Suit was commenced before the outlawry of the judgment.

The defense to this judgment was that, at the time the plaintiff acquired it, he was acting as the agent of the defendant to sell certain real and personal property, pay the defendant's debts, and account to him for the balance, if any.

The evidence introduced by the defendant to substantiate this defense tended to show that when the defendant, in the year 1876, left the state of New York and came to Michigan,

Digitized by Google

he left in the care of the plaintiff a large amount of real and personal property; that there were various mortgages upon the parcels of land owned by defendant, and, in order to cut off a dower-right in dispute, it was agreed that the plaintiff should procure the title of these lands in himself by having the mortgages foreclosed, and bidding in the title; that, in pursuance of such agreement, the plaintiff did thus obtain title in himself to 318 acres of land; that he sold all of it except 97½ acres, which he retains; and out of the proceeds of such sales, after paying the debts of defendant, he has a large amount of money in his hands, belonging to defendant, over and above the amount of this judgment.

To rebut this testimony, the plaintiff showed that November 7, 1885, the defendant in this suit filed a bill in the circuit court for the county of Clinton, in chancery, for an accounting and settlement of all differences between himself and the plaintiff, including the transactions in the state of New York, as well as matters of difficulty between them in Clinton county. It is claimed, also, that the differences in Michigan grew out of the New York affairs.

November 16, 1885, there was a settlement between the parties, which was evidenced by the following writing:

"Memorandum of agreement made and entered into this sixteenth day of November, A. D. 1885, by and between William H. Freeman, party of the first part, and Richard Freeman, party of the second part, witnesseth, that the parties hereto, being desirous of settling all matters of difference between them, of whatever name or nature, have agreed as follows:

"Party of the first part hereby agrees to give party of second part a good and sufficient quitclaim deed of the following described premises: The south fifty-eight acres of the north-west quarter of section four, and the east half of the south-east quarter of the north-west quarter of section five, all in the township of Olive, Clinton county, Michigan.

"The party of the second part hereby agrees to give party of first part a mortgage for two thousand dollars on the above-described premises, payable as follows: Five hundred

Digitized by Google

dollars on or before two years from date, five hundred on or before four years from date, five hundred on or before six years from date, five hundred on or before eight years from date, with interest at eight per cent., payable annually, on all sums unpaid. If party of second part should wish to make any one of the payments before due, he should give sixty days' notice to party of first part.

"Party of second part also agrees to deed, or cause to be deeded, to party of first part, by good and sufficient deed, the following described premises: The west half of the south-east quarter of section twenty-six, in Bingham, Clinton county, Michigan.

"Party of second part to pay the taxable costs in the case of *Alice L. Freeman v. William H. Freeman and William A. Freeman;* also the case of *William A. Freeman v. Richard Freeman,* before William H. Castel, circuit court commissioner.

"It is further mutually agreed that the parties hereto shall meet at the office of H. & H. E. Walbridge, St. Johns, on Thursday, to execute the necessary papers to carry out and fulfill the terms of this agreement.

"In presence of W. H. FREEMAN,
"PORTER K. PERRIN, R. FREEMAN.
"HENRY M. PERRIN."

On the seventeenth day of December, 1885, the solicitor of Richard, complainant in that suit and defendant in this, entered an order discontinuing the chancery suit, which order recited the fact that the parties to said suit, having settled all matters of difference between them, and adjusted the matters involved in the said bill of complaint, ordered that said cause be discontinued. This order was signed by C. M. Merrill, solicitor for complainant.

It was admitted on the trial of the present case that the bill of complaint in this chancery case covered all the New York matters, and all unsettled differences between the parties, and embraced the whole matter and transactions gone into by the defendant in the trial of this cause.

After the defendant had rested, the plaintiff, in rebuttal, introduced this contract of November 16, 1885, in evidence, and also the records and files in the chancery suit, including

Digitized by Google

the order discontinuing the same; whereupon, under objection, the defendant put in the testimony of one George Waldron, who was present at the settlement between the parties, who testified to the effect that in the talk leading to the settlement, and in the settlement, they confined themselves to the Michigan matters, and did not include the New York transactions.

The plaintiff's counsel moved to strike out this testimony, for the reason that it tended to vary and contradict by parol the written contract of the parties. The court refused the motion.

The defendant testified that he did not authorize his solicitor, Charles M. Merrill, to discontinue the chancery suit, but admitted that it was to be discontinued and dropped on account of the entering into of the contract of November 16, 1885, and it was so understood by both the parties.

The court submitted the case to the jury upon the theory that if the New York matters were not settled by the contract of November 16, 1885, the plaintiff could not recover. It appears from the record that the agreement of November 16 was carried out by the execution of the necessary papers. The jury found in favor of the defendant.

It is claimed by the plaintiff's counsel that the contract of settlement is clear and unambiguous, and should have been construed by the court, and not the jury; that the court erred in receiving and submitting to the jury testimony tending to explain, vary, and contradict this written agreement; that no fraud or mistake was claimed to invalidate it, and that by its terms, and the subsequent discontinuance of the chancery suit, all matters of difference between the parties were conclusively settled.

We think the counsel are right in their claim. The contract of settlement clearly imports that they intended by this agreement to settle all their differences "of whatever name or nature." It also appears, without dispute, from the tes-

Digitized by Google

timony of all the parties, that the chancery suit was to be dropped or discontinued by reason of such settlement, and the order shows the understanding under which it was discontinued.

The contract of settlement is complete in itself. It needs no explanation to be understood; there is no ambiguity about it. It clearly appears therein that the parties met, and agreed to settle all their differences, and solemnly put in writing the terms and details of such settlement, and appointed a time to execute the necessary legal documents to carry out and fulfill the same. It was afterwards executed and fully performed. We do not think the defendant can now be heard to establish that it was only a partial settlement of their differences, and that the New York matters then in suit between them were not included.

The jury should have been directed to find a verdict for the plaintiff in the amount of the judgment and interest.

The judgment of the circuit court for the county of Clinton is reversed, with costs, and a new trial granted.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

JOSEPH McCLURE v. GEORGE W. THORPE.

Pleading—Lease of farm on shares—Conversion of property by co-tenant—Damages.

1. A declaration not demurred to, and stating facts sufficient to warrant a recovery, and under which plaintiff made his case without objection, will be held sufficient in the appellate court.
2. A tenant in common has a right of action against his co-tenant for a wrongful conversion of the *joint* property.
3. In a suit by a tenant, who had leased a farm "on shares," for an unlawful ouster and the conversion of the crops by the landlord, an instruction to the jury that, if they found for the plaintiff, he would be entitled to recover the value of the crop harvested, and the amount it had depreciated, if any, through defendant's negligence, less the value of defendant's labor in caring for and harvesting the same and his interest therein under the lease, is unobjectionable.

Error to Saginaw. (Gage, J.) Submitted on briefs November 9, 1887. Decided January 5, 1888.

Trespass. Defendant brings error. Affirmed. The facts are stated in the opinion.

William H. Sweet (*W. H. Clark*, of counsel), for appellant.

Trask & Smith, for plaintiff.

SHERWOOD, C. J. In 1886, and for several years previous thereto, the defendant owned 80 acres of land in the county of Saginaw. He resided in Canada.

The plaintiff, in the spring of 1886, rented the property of one Bolt, who claimed to act in the premises as the agent of the defendant, and, under the terms of the lease, was to have the use of the farm for the year, and crop the same. He was to furnish seed and teams, and do all the work, and

Digitized by Google

was to give the defendant one-third of what he raised for the use of the farm.

The plaintiff entered upon the farm, and took possession thereof, under the lease, in good faith, and put in a quantity of spring crops. He did not live upon the farm, but not far therefrom.

The latter part of May, after the plaintiff had put in his crops, as stated, the defendant came from Canada, and, with his family, against the consent of the plaintiff, and without his knowledge, entered upon the premises, took possession of the house, and moved therein with his family, and has continued his occupancy of the house, and possession of the farm and crops, ever since, against the protest of the plaintiff, and harvested the crops put in by the plaintiff.

This suit is brought by the plaintiff to recover his damages for such alleged invasion of his rights and conversion of his property. The declaration is somewhat peculiar in some of its features, but was not demurred to; neither was there any objection to the plaintiff's proving his case thereunder, and we think it states the facts of the case sufficiently to admit of a recovery, if they are proved.

The defendant's plea was the general issue.

The cause was tried before Judge Gage, with a jury, and the plaintiff recovered to the amount of $109.53, and the defendant brings the case here and asks a reversal of the judgment, on the ground of alleged misdirection in the charge of the court, and misapprehension as to the character and scope of the plaintiff's declaration.

The last three assignments of error relate to the subject of the pleadings, and the plaintiff's rights thereunder, and have been disposed of in what has already been said.

There were four requests to charge which were refused by the court, and upon which error is assigned. The first asks the court to charge that, upon the undisputed proofs, the defendant did not break and enter the premises, but in a

Digitized by Google

quiet and peaceable manner. This was not a question for the court, but for the jury. Whether the entry was peaceable or not was a question depending upon the solution of several other facts in the case. Under the facts stated, it was a mixed question of both law and fact, and proper for the jury; but, under the declaration, the question is one of no consequence. The declaration states a case which would entitle the plaintiff to recover, and the jury, by the verdict, have found he proved it upon the trial, and as the record shows by testimony not objected to.

The second request of the four asks the court to charge that the lease was for a share of the crops, and, conceding its validity, the parties were tenants in common, and therefore the plaintiff cannot maintain this action. There is nothing in this. A tenant in common has a right of action against his co-tenant wherever there has been a wrongful conversion of the property by the co-tenant, and that is what the testimony in the case shows, without controversy, when the validity of the lease is admitted. *Sutherland v. Carter*, 52 Mich. 471 (18 N. W. Rep. 223); *Webb v. Mann*, 3 Id. 139; *Wilson v. Reed*, 3 Johns. 175; *Weld v. Oliver*, 21 Pick. 559; *Bray v. Bray*, 30 Mich. 479; Cooley, Torts, 455; *Grove v. Wise*, 39 Mich. 161.

The third and fourth of these requests are substantially the same as the second, and all four were properly refused by the court.

Exception is taken by defendant's counsel to that portion of the charge relating to damages.

The court charged, upon that subject, if they found the lease valid and as claimed, and that the defendant entered upon the land, and deprived the plaintiff of the use of it, and of his crop, as claimed by the plaintiff, he would be entitled to recover the value of the crops harvested, less one-third going to the defendant. If the crop was negligently cared for by defendant, and thereby depreciated, he would

Digitized by Google

be entitled to recover for the amount of the depreciation also; but would have to deduct from these two items the value of the labor of the defendant in caring for and bringing the crops to maturity, and also "for harvesting and gathering the crops." We think this charge was unobjectionable.

We find no error in the record, and the judgment must be affirmed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

---

68 36
69 569

68 36
119 303

CHARLES FERGUSON v. GEORGE GLASSFORD ET AL.

Mortgage—Discharge by mistake—Equity—Good-faith purchaser or incumbrancer—Notice.

1. It is an elementary rule that equity will consider an incumbrance in force if the ends of justice can thereby be obtained.
2. Where a mortgage has been discharged from the record through mistake, it may be restored in equity, and given its original priority as a lien, when the rights of innocent third parties will not be affected.
3. A discharge upon the record of a mortgage is not an absolute bar to a foreclosure, unless there has been actual satisfaction. The facts still may be investigated. Such discharge of record is evidence of a high character, and sufficient to sustain the rights of all persons interested, unless the person setting up the discharged mortgage shall show some accident, mistake, or fraud, and this must be shown satisfactorily, and, if not, the discharge is conclusive proof of payment in favor of third persons, who have a right to look to the record for protection.
4. Purchasers or incumbrancers who become such after the discharge of mortgage is placed upon record are entitled to the same protection which the recording laws afford to subsequent purchasers and incumbrancers in good faith, as against unrecorded conveyances, who can be affected only by actual notice, or notice of such facts as should have put them upon inquiry.

Digitized by Google

5. When it is conceded that the discharge of a mortgage was placed upon record by mistake, and the testimony satisfactorily shows that the mortgage debt has not been paid, a purchaser of the premises covered by the mortgage, who is informed by the mortgagor that the mortgage is still outstanding and held by a person, naming him, is affected with notice that the discharge was recorded by mistake, and is not protected by an abstract showing the mortgage to have been discharged.[1]

Appeal from St. Clair. (Stevens, J.) Argued November 10, 1887. Decided January 5, 1888.

Bill filed to foreclose a mortgage alleged to have been discharged by mistake. Complainant appeals from decree dismissing bill. Reversed, and record remained for further proceedings in the execution of the decree. The facts are stated in the opinion.

Mitchell & Wellman (*Atkinson & Vance*, of counsel), for complainant.

D. C. Walker (*E. G. Stevenson*, of counsel), for defendant Glassford.

CHAMPLIN, J. In this case it is conceded that the written discharge of the mortgage bearing date the sixth day of January, 1879, executed by Archibald Maxwell and Ann Maxwell to John Allen, was placed upon record by mistake. The defendant George Glassford purchased the land from Maxwell on March 10, 1883, and the only question is whether he had actual notice that the mortgage was an existing incumbrance notwithstanding the record. To this question of fact most of the testimony was directed. The burden of proof was upon the complainant to establish the fact of notice; and to the better understanding of the testimony, a short history of the antecedent facts will be given.

On the sixth day of January, 1879, defendants Maxwell made, executed, and delivered to John Allen a note and

[1] Head-notes prepared by CHAMPLIN, J.

Digitized by Google

mortgage to secure the payment of $295 five years from that date, with ten per cent. interest. Afterwards Allen sold this note and mortgage to James Thompson. Prior thereto, and on the fifth day of December, 1877, the Maxwells made, executed, and delivered a note and mortgage to Charles Ferguson to secure the payment of $300, payable in three years from date, with interest at ten per cent. This note and mortgage was sold by Ferguson to the same Thompson, who afterwards died testate, and Zaddock Hallock and Charles Kennet, Jr., were appointed his executors, and qualified. Maxwell, not being able to meet these obligations as they should mature, arranged with the complainant, Ferguson, to purchase and hold them; agreeing to execute new mortgages, when they should mature, at a further length of time to pay. Ferguson accordingly purchased the notes and mortgages from the executors, which were delivered to him; but, instead of taking an assignment in the usual form, the executors executed formal discharges of the mortgages, and delivered them to Ferguson, to be held by him until the mortgages were paid, and then to be delivered as discharges. This unbusiness-like method was adopted to save the expense of drafting and recording two assignments. The expense of drafting and recording the assignments has been saved, but the expense of a chancery suit has not been saved, and the hazard of a total loss of his mortgage lien has been incurred. The Ferguson mortgage matured December 5, 1880, and was not paid.

On August 6, 1881, the defendants Maxwell executed a new mortgage to complainant, Ferguson, for $400. This mortgage was to take up the $300 mortgage, then past due, with the accrued interest, and some money at that time advanced to Maxwell. This mortgage was not recorded until the thirteenth day of December, 1881. The discharge of the Ferguson mortgage of $300 was not discharged of record until the ninth day of January, 1882, and the discharge

Digitized by Google

was effected by recording the discharge executed by the executors. Prior to this time, the other discharge executed by the executors had been placed upon record, on the thirteenth day of October, 1881. The recording of this discharge is conceded to have been a mistake. The witnesses introduced by complainant refer to the mortgage of $295 as the $300 mortgage.

Mr. Allen testified that, prior to the purchase of the farm by Mr. Glassford, he had a conversation, in which he said to Glassford that he had heard that Maxwell was offered $2,400 for his farm; that Glassford replied: "That is correct. I am the man." On the sixth of March the defendant Glassford was at Maxwell's place, and made him an offer for his farm. The conversation was had both in the barn and in the house, in the presence of several persons. All agree that the agreement was that Glassford was to pay $1,650, and a horse, valued in the trade at $150; and the point the witnesses do not agree upon is the incumbrances he was to assume and pay off. Maxwell and his wife both understood at that time that Ferguson held the two mortgages,—one for $295, and the mortgage for $400,—and they both regarded them as existing liens upon the property; and at that time the defendant Glassford knew nothing to the contrary. He had not at that time examined the records, and the Maxwells were not aware that a discharge of the $295 mortgage had been recorded.

In examining the weight to be given the testimony of the witnesses whose testimony conflicts, we must bear in mind what at that time was the understanding of the Maxwells as to the incumbrances then on the place, and the want of knowledge of Glassford as to what incumbrances there were upon it, or what the record showed. Maxwell testified that he sold the place subject to the mortgages, which Glassford was to pay as part of the purchase price; that he told Glassford that there were two mortgages upon the place, both held by

Digitized by Google

Ferguson,—one for $300, and one for $400,—besides some back interest, making $700 which Glassford was to pay; that in his talk with Glassford he referred to the $295 mortgage as being a $300 mortgage. In this statement as to informing Glassford that there were two mortgages on the place, which he was to pay,—one of $300, and one of $400,—held by Mr. Ferguson, he is corroborated by Mrs. Ann Maxwell, his wife, Alexander Drummond, and John Drummond. They are contradicted by defendant Glassford, who testified:

"I then made him an offer of $1,650 and the white-faced mare; that was the first offer. Says he, 'No.' 'Well,' says I, 'I will make you one more offer, and I will never make you another. I will give you $1,650 and the white-faced mare, subject to that one mortgage, drawing eight per cent. interest.' He told me the amount of the mortgage, $400. He says, 'The place is yours.' And then we went to the house and we had our supper."

In this statement he is corroborated by George Lammerman, his son-in-law, who was also present on that occasion, who in his testimony also uses the expression "subject to that one mortgage."

If we strive to arrive at what was the bargain talked up at that time, we should place ourselves in the position the parties occupied, and consider the facts and surrounding circumstances. Maxwell understood that Ferguson held two mortgages,—one of $295, drawing 10 per cent. interest; and another of $400, drawing 8 per cent. interest. He was offering his farm for sale subject to the incumbrances. There is no reason why he should not include both mortgages in his offer, and the expression made use of by Glassford in his version contains within it a strong inference that he had been informed of an outstanding 10 per cent. mortgage, viz.: "Subject to that one mortgage, drawing eight per cent. interest." It must be borne in mind that neither of the parties at that time knew that the Allen mortgage had been discharged of record. It is likely that he was informed of all

Digitized by Google

the incumbrances there were on the place, or that Maxwell understood there were on the place. Common prudence would have led Glassford to inquire as to the incumbrances.

It is not to be presumed that he would blindly pay the full value of the land, and leave incumbrances thereon which he might be called upon to discharge. I conclude, therefore, that the probabilities are that Maxwell informed him of the fact that Ferguson held two mortgages, which were then liens upon the property. Indeed, by Glassford's own testimony, Maxwell referred him to Ferguson to get his abstract, which Ferguson held, but he preferred to procure one himself.

Other corroborative testimony was introduced to prove notice. One Lewis Presley testified that, two or three weeks after Glassford moved on the place, he told him that he paid in the neighborhood of $2,500 for the place, subject to a mortgage or mortgages amounting to $700; that he paid $1,650 in money, a mare worth $150, and there were two mortgages, amounting to $700, and some back interest. Testimony was introduced tending to impeach this witness, and in the disposition of this case Presley's testimony may be laid out of view.

Alexander Drummond testified to a conversation which he had with Glassford before he purchased, in which he asked him what mortgages there were upon the place; and he told him all he knew about it was what Maxwell said, and that was that there was one of three hundred and one of four hundred dollars. Glassford testified to having a conversation with Drummond, but says that Drummond told him he could get the place for $1,400, subject to the mortgage there was against it, and how much the mortgage was he did not say. He also testified that, only a short time after that, the first offer he made Maxwell for his farm was $1,600, and then an offer of $1,650; and, when that was refused, he increased it by the offer of the white-faced mare, and the payment or assumption of the 8 per cent. mortgage. If

Digitized by Google

Drummond told him he could get the place for $1,400, it is a little singular that his first offer should be $1,600. Testimony was introduced for the purpose of impeaching the witness Alexander Drummond by attacking his reputation for truth among his neighbors. I do not think they succeeded in doing so.

Charles Ferguson, the complainant, testified as follows:

"The first time I went to Mr. Glassford,—it was in the spring of the year after he got possession of the place,—I went to his place to see him about this mortgage,—to see what he was going to do about it; see whether he would pay it. And I asked him if he didn't want to pay it, and he said 'No;' that he had a bargain with Maxwell; that he said something about it expressed in the deed that he wasn't only to pay the one mortgage. I asked him if Maxwell didn't tell him about two. Well, he admitted that Maxwell told him that there was two mortgages, but he wouldn't take his word for it. He found on the records that one of them had been paid, and he said he made his bargain according to the abstract, and he wasn't going to pay the mortgage. Still, he admitted they told there was two, and it amounted to $700.

"At first Glassford admitted to me that Maxwell told him about the two mortgages of $700, but he was not going to take his word for it; the record was what he was going by. Glassford said he was not bound in law by what Maxwell said. He bought it according to the abstract. I told him he was in law bound by the information that Maxwell gave him about the two mortgages. He said he wasn't going to take Maxwell's word; he was going to go by the records. I said to him, if the mortgage was never recorded, he could not find it on the records. He said that the records was the only means of information he was bound by. After he went and searched, and found that one of the mortgages was discharged, he made a bargain to pay the mortgage according to the abstract, and that he was not bound by what Maxwell told him; he would not take no man's word."

After Glassford had made the verbal offer for the farm which had been accepted by Maxwell, he went to Port Huron, and procured an abstract of the title. This disclosed but one mortgage upon the premises; namely, that of $400, running

Digitized by Google

to Mr. Ferguson. This abstract bears date on the sixth of March, 1883.

On the tenth of March, 1883, the parties met in Mr. Walker's law office to have the deed prepared and trade closed. Mr. Glassford produced his abstract, and requested Mr. Walker to examine it, He did so, and pronounced the title in Maxwell, and incumbered only by a mortgage of $400 given by Maxwell to Ferguson.

Mr. Walker testified, in behalf of defendants, as follows:

"I will state that on the tenth day of March, 1883 (I should not be able to locate the date only by reference to the deed that I made on that day, and which I will introduce here), Mr. Glassford, the defendant here, and Mr. Maxwell, came to my office, and wanted to know if I was at leisure. I told him I was; and Mr. Glassford said, if this abstract is all right, they wanted a deed made, and produced this paper, which was called an abstract. I should judge from what they say they wasn't hardly able to figure it out to know exactly what it read, and they wanted me to examine it, and, if it was all right, they wanted a deed made. Then I took the abstract; run it through carefully. I told them that the title seemed to be straight in Mr. Maxwell; it passed through but one or two hands, and the title seemed to come straight to Maxwell; that Mr. Maxwell had given several mortgages, but they were all discharged except one of $400, drawing 8 per cent. interest, and read the date of that mortgage to both of them.

"Says I, 'Is that as both of you understand it?' and both assented to it, and says, 'If that is the shape of it, go on and draw the deed.' They came there alone. In drawing the deed, I saw it was a curious description,—'the south part;' but I had drawn some deeds before of fractional lands, and knew it was meandering. I saw it said in the abstract, 'supposed to be 100 acres.' Says I, 'Is that correct?' Mr. Maxwell says it is 128½ acres,—it had been surveyed and contained 128½ acres; so I placed that in there. They stated their bargain; how much he was to pay down, and that it was to be subject to that mortgage. They wanted to know how long it would take me to draw it. Says I, 'Not over half an hour.' Says I, 'Is your wife down here?' They said she was. Says I, 'You can go and get her, and probably by the time she gets here I will have the deed finished.' When she came in I had drawn up this deed, which I here offer in evidence, and

Digitized by Google

is marked in 'Exhibit 3.' They stated what the consideration was to be,—that he was to pay $1,800, and pay that mortgage of $400, and interest; and something was said about the interest. Says I, 'Is it all the interest from that time, or has any of it been paid?' Maxwell said something like this: If it is over a certain amount (I can't tell you what it was) of interest,—I think he conveyed the idea he had paid some interest on it, but, if it was over a certain amount, he would make it good. 'Well,' says I, 'we will call it subject to the amount of the mortgage.' I wasn't certain whether he paid any or not. He made the remark, 'I have paid at different times to Mr. Ferguson moneys, and I don't know much of anything about it; only have trusted to his honesty; have taken up a mortgage and given a new one,' etc.

"No allusion was made at that time in their instructions to me, nothing said about any other mortgage than the one that was said; and that was all that was said in relation to the consideration. I drew the deed according to those instructions, and, before I had got quite through with it, Mrs. Maxwell and some others (I can't identify them, but two or three), came in, and they both said they didn't write; so I had them, after reading it to them carefully, so there should be no mistake about it. I read it carefully to them, and distinctly, and no objection was made to it. Says I, 'If it is right, sign it.' They said, 'We make our marks; we don't either of us write our names.' I knew Mr. Maxwell didn't before, but I didn't know as to his wife. Mr. Glassford (I can't say whether that was in the first conversation, or after returning in there) says, 'I shan't pay any money over until I know that nothing has taken place since that abstract was made.' Well, I rather laughed at the idea. Says I, 'I don't think there is any danger in you paying over your money.' 'Well,' says he, 'it is all the money I have; I don't want to hazard it at all.' Says he, 'I have known of deeds and mortgages to be made and put on record before another deed that should have gone on record first,'—something of that kind. He alludes to a transaction of that kind; and says he, 'I will put the money in any one's hands to keep until I can go down, and see whether anything else has gone on since that abstract was made;' and I don't know whether Mr. Broker was spoken of or not, but he was sent for, and came in, and the money was counted out, $1,650, corresponded to the amount, reckoning the horse $150, named in the consideraton; and it was warranted to

Digitized by Google

be free and clear of all incumbrances except the mortgage of $400, bearing such a date as the agreement on Glassford's part to pay that which he assumed and agreed to pay; and Mr. Broker came in and witnessed the instrument, and witnessed the putting of the marks there, and took the money; and Mr. Glassford said he would go to Port Huron, and, if it was all right, he would telegraph right to us, ♥ they could get the money that day and go home. That is all I know about it. Mr. Broker came in before I had got quite completed; he came in about the time I had commenced to read it before it was signed. I think all of them had left while I was making the deed, and I sat there at my desk and wrote it alone; but a number of them came in before I got it complete, and there was no conversation,—they all sat still there. I said to them, 'I have got this nearly finished;' and nothing was said until it was done, and I read it, and it was signed, and the money counted out and given to Broker."

The testimony of Mr. Walker is given in full, as the defendants place great reliance upon it, as tending to establish the entire want of knowledge or information that there were two mortgages upon the premises at the time of sale. It may be granted that Mr. Walker states what occurred and was said in his office with entire accuracy; and yet it is consistent with the fact that, when Glassford made the verbal agreement at Maxwell's on the Monday before, he was informed that Ferguson held two mortgages against the place, —one for three hundred and another for four hundred dollars. Nothing was said in his presence relative to any previous talk between the parties. The most that can be said from his testimony is that, had there been no previous colloquy between Glassford and Maxwell, there was nothing in what was said or done in his presence that would tend to prove that Glassford had actual notice that the $300 mortgage was still an existing incumbrance upon the property. There were present, before the deed was finally executed, Mr. Walker, Mr. Glassford, the brother of defendant, Mr. Maxwell, his wife, Ann Maxwell, Mrs. Hoffman, Sidney Broker, and defendant Glassford. Mr. and Mrs. Maxwell and Mrs.

Digitized by Google

Hoffman each testified that both mortgages were mentioned on that occasion, and the other persons named testified that only the $400 mortgage was mentioned.

We may conclude that the mortgage in dispute was not there mentioned; still, from a consideration of the whole testimony, and the impression it makes upon my mind, I cannot escape the conviction that defendant Glassford had information which, at the least, should have put an ordinarily prudent man upon inquiry that Ferguson held two mortgages upon the premises, and such information as amounted to actual notice of the existence of the mortgage in question. The testimony introduced tended to show that the farm was worth $2,500, and I do not understand that this evidence is contradicted by defendant Glassford; and this fact has a bearing upon the probabilities regarding the question of his being informed of the two mortgages, aggregating $700.

It is an elementary rule that equity will consider an incumbrance in force if the ends of justice can thereby be obtained. *Lowrey v. Byers*, 80 Ind. 443. And, where a mortgage has been discharged from the record through mistake, it may be restored in equity, and given its original priority as a lien, when the rights of innocent third parties will not be affected. *Sidener v. Pavey*, 77 Ind. 241; *Hanlon v. Doherty*, 109 Id. 37 (9 N. E. Rep. 782).

The courts of New Jersey hold, and I think correctly, that the simple cancellation of a mortgage on the record is not an absolute bar to a foreclosure, unless there has been actual satisfaction. It is not conclusive evidence. The facts may still be investigated. But it is evidence of a high character, and sufficient to sustain the rights of all persons interested, unless the party setting up the discharged mortgage shall show some accident, mistake, or fraud, and this must be shown satisfactorily on his part. If not so shown, the discharge is conclusive proof of the payment, especially in favor of third persons, who have a right to look to the record for

Digitized by Google

protection. *Banta v. Vreeland,* 15 N. J. Eq. 103, 107; *Freeholders of Middlesex v. Thomas,* 20 Id. 42; *Harrison v. Railroad Co.,* 19 Id. 488; Jones, Mort. (3d ed.) § 966; *Trenton Banking Co. v. Woodruff,* 2 N. J. Eq. 117; *Lilly v. Quick,* Id 97; *Miller v. Wack,* 1 Id. 214.

In *Trenton Banking Co. v. Woodruff, supra,* the court said:

"It has been settled in this court that the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and leaves it open to the party making such allegation to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgagees without notice;" citing *Miller v. Wack* and *Lilly v. Quick.*

The statement as laid down is too broad. What the learned court meant by subsequent mortgagees were those who were subsequent to the mortgage which was discharged, but who became mortgagees before the discharge was placed upon record. This is evident from the cases cited by the court. If they become mortgagees or purchasers after the discharge is placed upon record, they are entitled to the same protection which the recording laws afford to subsequent purchasers and incumbrancers in good faith, as against unrecorded conveyances, who can be affected only by actual notice, or notice of such facts as should have put them upon inquiry. The rule was applied by this Court in *Sheldon v. Holmes,* 58 Mich. 138 (24 N. W. Rep. 795). In this case it is conceded that the discharge of the mortgage in question was placed upon record by mistake. The mortgage, then, appears to be an existing lien as between the parties, and those in privity with them, with notice that the holder claimed it to be an existing lien.

My conclusion from the whole testimony, disregarding the testimony of the witnesses claimed to have been impeached, is that defendant Glassford had such notice. It follows that

Digitized by Google

the decree of the court below must be reversed, and a decree made in accordance with the prayer of the bill.

The complainant having, by his negligent method of doing business, made it necessary to resort to these proceedings, will not recover any costs in this Court, and neither party will recover costs in the court below.

The record will be remanded to the circuit court for the county of St. Clair for further proceedings in the execution of the decree.

SHERWOOD, C. J., and MORSE, J., concurred. CAMPBELL, J., did not sit.

68 48
81 24
68 48
85 670
68 48
98 590
68 48
140 $100

EDSON WITHERAL v. THE MUSKEGON BOOMING COMPANY.

Logs and logging—Negligence—Injury to reparian owner—Evidence—Land contract—Right of navigation.

1. Evidence that a booming company had possession of a river in which its men were running logs, which jammed below the land of a riparian owner, and that the company continued running logs against said jam until it extended and filled the river above said land, where it remained for about one month, is sufficient, if unexplained, to make out a *prima facie* case of negligence; and it is not necessary for the plaintiff to negative the exercise by the company of reasonable care and dispatch in its work, or to specify in what respect its employés were negligent.
2. A vendee in possession of land under a paid-up contract, and entitled to a deed, has a sufficient title to enable him to recover for hay and pasturage lost through the negligent flooding of the land by a booming company.
3. Under a clause in a land contract giving to the vendors one-half of the proceeds of the hay raised upon the land until the purchase price is paid, the vendee must account in *money* for the value of the share reserved, but the title to the property and right of possession remain in him.
4. In a suit to recover the value of hay lost through the negligent flooding of plaintiff's land, evidence of the amount cut during

Digitized by Google

the preceding year is admissible to show the capacity of the land for producing hay.

5. The destruction of plaintiff's pasturage by the negligent flooding of his land is *prima facie* evidence of damage to the amount of its value.

6. A log-owner has the right to use a stream in its *natural* capacity to float his lumber or timber, and is not responsible for any damage incidentally and without his fault arising therefrom. But he has no right to deal with his logs in such a way, by the formation of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left to themselves, and allowed to float down naturally and without artificial interference.

7. The Muskegon river has a well-defined channel or bed between well-defined banks or sides; and the low or bottom lands upon the sides of the stream, that are overflowed more or less in times of high water, are not within its boundaries; and the capacity of said stream cannot be increased by artificial means so as to permit the log-owner to use at all times the full volume of water that may flow therein during unusual and brief freshets.

8. The public right of navigation is measured by the capacity of the stream for valuable public use in its *natural* condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation.

Error to Muskegon. (Montgomery, J., presiding.) Argued November 10, 1887. Decided January 5, 1888.

Trespass on the case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Keating & Dickerman (*Edwin F. Uhl*, of counsel), for appellant.

Gallup & Pearson (*Smith, Nims, Hoyt & Erwin*, of counsel), for plaintiff.

MORSE, J. In November, 1886, the plaintiff, who resides in Missaukee county, commenced this suit against the defendant, in the circuit court for the county of Muskegon, for damages to his premises and property, situated upon the banks

Digitized by Google

of the Muskegon river, in Missaukee county, occasioned, as he claims, by the defendant's wrongful action while in the control and possession of said river, and in the transaction of its business as a booming company.

The claim, as developed upon the trial, was for damages to his hay crop in the years 1881, 1882, 1883, 1885, and 1886, and the loss of pasturage for his cattle during some or all of the years from 1881 to 1886 inclusive.

The declaration averred that this injury and loss were occasioned by reason of said defendant carelessly, improperly, and negligently allowing a jam or jams of logs, timber, and other floatables to accumulate in said stream, below the close and premises of said plaintiff, and so permitting the same to remain for a long space of time; by reason of which jams the river overflowed its banks and flooded the plaintiff's lands, destroying his crops of hay, and washing away the approaches to a bridge he had built across the river, so that he was unable to use his pasture land.

The plaintiff purchased his land in April, 1876, taking a land contract for the same of the firm of Gerrish, Murphy & Co., who were then the owners of it. The farm contains 240 acres, and lies on both sides of the river. When plaintiff went into possession of it, there were 60 acres cleared on the right or west bank. His house was on the left or east bank. What he has cleared since has been mostly high land. His meadows, or bottom lands, were on the west bank, opposite of his house. He had access to these lands by a bridge maintained by him across the river.

He recovered a judgment upon the verdict of a jury in the sum of $500.

The defendant brings error.

After the plaintiff had rested his case, the defendant moved to strike out all the evidence in the case, and that the court direct a verdict for the defendant, for the reason that the plaintiff had not thus far established any negligence upon

Digitized by Google

the part of the defendant, or shown how or in what manner the defendant had been guilty of negligence, which motion was overruled.

We think there was evidence at the close of plaintiff's case sufficient to warrant its submission to the jury. The plaintiff testified that in the middle of April, 1881, the booming company had possession of the river, and its men were running logs thereon; that the logs jammed below his place, and the company, by its employés, kept running logs down against this jam and filled up the river until the jam extended through his farm and above it, and that the jam laid there from the middle of May until the tenth of June. This was certainly sufficient to call for explanation and excuse, if any could be shown, upon the part of the defendant. Without explanation, it was *prima facie* evidence of negligence.

A mere jam of logs in the river does not, in itself and by itself, constitute negligence upon the part of the booming company running the river; but the existence of such jam for a month or more, and the continued running of logs in such a manner as to increase the jam during such period, does constitute negligence, unless there is a showing that such a state of things could not reasonably be avoided.

It was not necessary for the plaintiff to go further than he did, and show that the company did not use reasonable care and dispatch in its work, or to specify in what respect its employés were careless or negligent.

We do not perceive that the court erred in admitting the plaintiff's proof of title. He had paid up the contract and was entitled to a deed. He went into possession under it at once, and has ever since remained in possession, and his title under the contract and his possession were sufficient to entitle him to recover for the hay and loss of pasturage. *Field v. Log Driving Co.*, 67 Wis. 569 (31 N. W. Rep. 17); *Hungerford v. Redford*, 29 Id. 345; *McNarra v. Railway*

Digitized by Google

Co., 41 Id. 69; *Carl v. Railroad Co.*, 46 Id. 632 (1 N. W. Rep. 295).

The contract contained the following clause:

"The said parties of the first part [Gerrish, Murphy & Co.] are to have one-half of the proceeds of the hay raised on said premises until the whole amount is paid."

The defendant's counsel claim that one-half of the hay belonged, under this provision, to Gerrish, Murphy & Co. We do not consider that this clause of the contract gave Gerrish, Murphy & Co. any title to the hay. The plain intent of the language is that plaintiff should account to them in money for the value of one-half of the hay, but the hay was to be gathered, sold, or otherwise disposed of as the plaintiff saw fit; the title, property, and possession always remaining and being in him.

The plaintiff was allowed to state, against the objection of defendant's counsel, the amount of hay he cut upon this land in 1880, the year before he claimed any damage to his crop by the company. This evidence was admissible to show the capacity of the land for producing hay. *Booming Co. v. Jarvis*, 30 Mich. 327.

It is argued that the plaintiff was not entitled to compensation for the loss of pasturage, occasioned by the flood or overflow washing away the approaches to his bridge so that he could not get his cattle across the river and upon his pasture lands, because it is not shown that his cattle were not as well fed in the road or somewhere else, or that they were not in as good condition, or that he was put to any expense in herding or feeding them, growing out of the inability to reach his meadow ground.

This argument requires no extended answer. The plaintiff was entitled to the benefit and worth of this pasturage. If it was destroyed by the negligence of the defendant its destruction was, of itself, *prima facie* evidence, to say the least, of damage to the amount of its value.

Digitized by Google

The circuit judge instructed the jury as follows:

"The right of the plaintiff to farm his land and of the defendant to navigate the stream were concurrent rights, and the defendant was not responsible for any injury to the plaintiff arising from the location of his farm where the stream was subject to the proper use by the defendant of its water for purposes of navigation. And the first duty of the jury in this case is to distinguish between the responsibility and duties of the defendant in the management of the river, and the duties of the others, or the responsibility of others.

"It is admitted, for instance, or at least the evidence is all one way on the question, that the defendant did not itself put the logs in question in this stream in any of those years, and therefore it follows that any injury which was caused to the plaintiff by reason of the fact that such logs were in the stream, and created jams, would not be recoverable in this action against the defendant, nor would the defendant be liable to the plaintiff for any injury caused by running logs down the stream by the defendant, if it did so in a careful, prudent, and diligent manner, having due regard to the rights of the plaintiff and the injury liable to be suffered by him and other riparian owners by the backing up of water caused by jams, etc.

"The plaintiff, to make a case, then, must show that the defendant was guilty of the neglect of duty, and of the failure to use due diligence and care to prevent unnecessary flooding while operating upon the river. What then was the duty of the defendant in the premises, the failure to observe which would render it liable? The duty of the company was to employ a sufficient force of men to break jams as soon as possible when formed by causes not attributable to it, as, for instance, by a roll-way put into the stream by others,—as soon as possible after the company had assumed control of such roll-way is meant, or had the right to assume control of it,—and to use a sufficient force of men, and to employ due diligence to prevent the formation of jams; and if jams were formed by the company while running logs, which could have been prevented by the exercise of due diligence and caution, and injury resulted to the plaintiff by the backwater caused by such jams, the defendant would be liable.

"So, if a jam already formed by others, as by a roll-way so found in the stream, and the defendant negligently and not of necessity drove logs upon and against such jam, and thereby increased such jam, and the consequent backing of

Digitized by Google

water, when by the exercise of due care it might have broken such jam before running such logs down to and against it, or if the jury are of the opinion that due care and caution and prudence would have dictated and required the holding back of such logs until such jam was broken, and should find as a fact that the defendant drove such logs down unnecessarily, then the defendant would be liable for such damage as would be caused thereby; and, of course, as the defendant was not responsible for the logs being in the stream, it follows that no liability would arise on this ground unless the defendant was actually running the logs down to and against the jam. If the current of the stream, unassisted, would take the logs down, and the defendant did nothing towards assisting of the running of the logs, no liability would arise.

"You will understand that the converse of these propositions I have stated is true, viz.: If the company employed a sufficient force of men to break the jams within a reasonable time after the same formed, or after they took charge of the same when formed by others, or had the right to take charge of the same, and if the servants of the company used due diligence and care to prevent the formation of jams, and did not contribute by negligently running logs against the jams, or form or increase the backwater on plaintiff's land, there can be no recovery.

"As to when it became the duty of the defendant to take charge of jams formed by others, I instruct you that whenever it becomes necessary to enable the defendant to run its logs without damage to the riparian proprietors,—and by this I mean without damage other than such as would arise from the unobstructed navigation of the stream by the logs,—whenever, I say, it became necessary for the defendant, in order to navigate the stream in this manner, to break jams caused by others, it had the right to take possession of the logs forming such jams and to break the jams. It not only had the right to do so, but before it would be privileged to run logs up and against such jams, thereby increasing the said backing of water upon the plaintiff's land, it would become its duty to do so.

"Unless such necessity arises from the obstruction of its own business in running the logs upon the river, the defendant had no right to assume control or management of logs of third parties which were also floating in the river, unless the parties owning these logs consented to the booming company doing so, and, even where this necessity arises from the obstruction to the booming company, it cannot assume con-

Digitized by Google

trol and management of the logs of third parties who have not consented to the same being done unless those parties are guilty of negligence in managing their logs floating on the river, or have not made adequate provision for the same; that is to say, unless it becomes necessary, unless they find jams or other obstructions to the proper navigation of the stream, then the company would have no right to take possession of the logs, and certainly would not be accountable to the plaintiff or to other riparian owners for any injury they suffered by logs owned by other parties being in the stream.

"Some evidence has been offered which it is claimed tends to show that on certain occasions the water was let down in large quantities from above by parties operating on the Butterfield, and Houghton lake, causing an increased flooding of plaintiff's land. The defendant cannot be held responsible for this, and is, of course, not liable for any injury which resulted to the plaintiff by reason thereof. Nor is the company liable for any injury caused by ordinary freshets, nor by floods created or caused by roll-ways of third parties situated below the premises of the plaintiff, which created jams, and which caused the water to back upon and flood the premises of the plaintiff.

"To sum up briefly then, what will justify a recovery, the plaintiff must show, or you must find from the whole evidence, either—

"*First*, that the defendant caused the jams in the river which occasioned the overflowing of plaintiff's land, doing him damage; or, *second*, that jams of logs under its charge occurred, which the exercise of due care on its part might have prevented; or, *third*, that the plaintiff suffered because the defendant did not exercise due diligence in breaking such jams as may have been formed; or, *fourth*, that the defendant caused a flood, or an increase of flooding, by running logs against such jams caused by others, in a negligent and unreasonable manner.

"To entitle the plaintiff to recover it must also appear that the flooding of which the plaintiff complains exceeded that which resulted from logs running down the river in a natural state. By this I do not mean to say that, because the logs might have jammed if left uncontrolled, the defendant would not be liable if a jam was negligently permitted to form, and from which the plaintiff suffered while the logs were under the control of the defendant, and being run by the company.

Digitized by Google

"I think a positive duty devolved upon the defendant, and it cannot be assumed that the owners of the logs would have left them uncontrolled if the defendant had not taken charge of them, and certainly the right of navigation involves no right upon the part of the owners, of those controlling logs, to cast them into the stream and leave them thus uncontrolled.

"The question is whether the plaintiff suffered because of jams which were made by those logs while under the control of the defendant, which logs caused a larger overflow of water than the proper navigation of the stream by such logs would have caused, and caused the forming of, or increasing to damaging proportions of, such jams, having been formed by the defendant, taking the stream as it found it, with the logs as it found them in the stream, and running the logs in a diligent, careful, and prudent manner. If these questions are determined in the affirmative, the plaintiff is entitled to recover; otherwise, not."

The jury were also instructed that the burden of proof was upon the plaintiff to establish his case, on each fact requisite to make his case, by a fair preponderance of the evidence in the whole case.

Most of the requests asked by defendant's counsel were fairly and substantially covered by this charge; and as a whole no reasonable fault can be found with it.

The court was requested to instruct the jury that the natural channel of the Muskegon river is within the boundaries that the water reaches at high stage; that if the jury found that the lands of the plaintiff were overflowed by floods on the river in the absence of logs, or with logs floating in their natural condition and not controlled by man, at the high stages of the river, which it might reach at one or more times during every year, then the plaintiff could not complain if the floods upon his premises were at no greater height than when the river was at high stage, as the boundaries of the river extend to where they would be when this river was at its high stage, and not when the river was at its low stage; that the boundaries of the Muskegon are not the boundaries

Digitized by Google

marked by low-water mark on the river, but those defined and marked by the *highest* mark of water flowing through the premises of plaintiff at any time during the year; and that the defendant had the right to use the river to the width of these natural boundaries, when the river stands at its highest water-mark, in the transportation of logs. The refusal of the circuit judge to so instruct the jury is assigned as error.

The doctrine contended for in the language of this request is broad enough to permit the defendant at any time of the year to dam up the river, by jams or otherwise, and flood the plaintiff's land to the full extent of the most extraordinary freshet of the year; and it is gravely argued by defendant's counsel that because the testimony shows that in April, when the snow would go off suddenly, nearly the whole of the 15 acres of the plaintiff's bottom land or meadow would be overflowed for three or four days, therefore the defendant was entitled to so flood it in the running of its logs at any time and all times of the year. There is neither sense nor law in this claim. Such doctrine applied to the navigable streams of this or any other state, would practically destroy the rights of riparian owners to the use and benefit of the best and most valuable lands in the country, and, instead of giving concurrent rights to the land proprietor and the navigator, would make the landed estate servient and subordinate to the rights of navigation.

The chief argument in favor of this proposition we listened to, but cannot tolerate. It was contended that the lumbering interests of this State were so extensive, important, and valuable, and the work of running logs in these streams so necessary to the welfare and prosperity of the business interests of our State, that the policy of the law must impose this servitude and damage upon the small farmer, or this vast source of wealth and profit and livelihood to so many of our citizens be crippled or entirely destroyed. But the theory of

Digitized by Google

the law cannot be this. The law had its origin in the desire to protect the weak against the strong, and thereby to preserve order and the public peace; and as the years have advanced and enlightened the law, they have settled, we think, at least in a republican form of government, the right and privilege of the poorest and the weakest man to hold and retain his little own, under the law, equally with the highest and strongest of his fellows. It is better in the present case that there should be, if need be, a little less wealth and profit grow out of the lumbering business, rather than that, in effect, the title deed of one man to his home, or any part of it, should be swept or flooded away from him without recompense.

The law as to the rights of the log-runner has been well stated by this Court on several occasions. The log-owner has the right to use the stream in its natural capacity to float his lumber or timber, and is not responsible for any damage incidentally and without his fault arising therefrom. But he has no right to deal with his logs in such a way, by the formation of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left to themselves, and allowed to float down naturally and without artificial interference. *Booming Co. v. Jarvis*, 30 Mich. 308; *Log Co. v. Nelson*, 45 Id. 578 (8 N. W. Rep. 587, 909); *Anderson v. Boom Co.*, 61 Id. 489 (28 N. W. Rep. 518); *Booming Co. v. Speechly*, 31 Id. 344; *Bauman v. Boom Co.*, 66 Id. 544 (33 N. W. Rep. 538).

The Muskegon river has a well-defined channel or bed between well-defined banks or sides. The low or bottom lands upon the sides of the stream, that are overflowed more or less in times of high water, are not within the boundaries of said stream; and it has been heretofore settled in *Booming Co. v. Speechly*, that the capacity of these navigable streams cannot be increased by artificial means, so as to permit the log-owner to use at all times the full volume of water

Digitized by Google

that may flow in the stream during unusual and brief freshets.

The public right of navigation is—

"Measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interest can be justified only on an assessment and payment of compensation."

See, also, *Morgan v. King*, 35 N. Y. 460; *Hubbard v. Bell*, 54 Ill. 110.

Much of the argument of the defendant's counsel here has been devoted to the claim that the evidence taken together upon both sides established the fact that the defendant used all the diligence and care within its power, under the circumstances, to remove these jams and to run the logs without injury to the plaintiff; that the company was not negligent, but that the damage was caused by the joint action of log-owners below and above the land of plaintiff, consisting of the maintaining of jams and roll-ways by those below, and the running down by those above of large quantities of logs from the creeks and other tributaries of the Muskegon against these jams below.

We think there was evidence sufficient to go to the jury upon the question of the defendant's negligence and liability, and with the weight of the testimony we can have no concern.

A careful examination of the charge of the court, as stated in this opinion, will, we think, disclose that the circuit judge clearly advised the jury that the defendant was not liable for the acts of these third parties. The defendant, under the instructions of the court below, was not to be held liable for any damage occasioned before it assumed control of the logs or had the right to do so, and not then if it ran the logs in a careful, diligent, and prudent manner. If the defendant was not running logs down the stream against these jams,

Digitized by Google

and did nothing in assisting them down, no liability would arise. And if the company used a sufficient number of men to prevent the unnecessary formation of jams, and to break the jams already formed within a reasonable time after it took charge of them, or had the right to take such charge, and did not run logs unnecessarily against these jams, there could be no recovery.

It seems to me, from the evidence in the record and the charge of the court, that the question of the defendant's liability was fairly submitted to the jury, and that no prejudice resulted to it because of a want of care on the part of the circuit judge in pointing out the distinction between the liability of the defendant company for its own negligent acts and its liability for the acts of other parties who were running logs upon the river. I do not think the jury were misled into assessing damages to the defendant which belonged to others to pay.

There was evidence introduced in rebuttal by plaintiff tending to show that the jams formed by others below, and the running of logs by others above, plaintiff's farm, did not cause the injury to plaintiff. As such evidence is not given in full we cannot judge of its weight or truth, if we had the right to do so.

The judgment will be affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

ELVIRA M. MONFORT AND ELVIRA C. WINCHELL v. WELLS J. L. STEVENS.

Contract—Construction of—Intention of parties—Deed—Practical construction.

1. The only object in construing a contract is to arrive at the intention of the parties.
2. What the parties to a deed did immediately after its execution affords a safe criterion of their intention and of the meaning of the language used in the conveyance.

Error to Calhoun. (Hooker, J.) Argued November 10, 1887. Decided January 5, 1888.

Ejectment. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

M. D. Weeks (*F. P. Monfort*, of counsel), for appellants.

N. B. Gardner (*Miner & Stace*, of counsel), for defendant.

CHAMPLIN, J. In this action of ejectment both parties claim through Samuel Huxford.

The cause was tried before Hon. Frank A. Hooker without a jury, who made a written statement of facts and law as follows:

"1. On the first day of November, 1865, Samuel Huxford was seized in fee of the following-described premises, viz: Commencing at a stake one hundred feet west of the northeast corner of block number fifty-seven, in the village of Albion, running thence south, parallel with the east line of said block, to the north line of railroad lands; thence northwesterly, along said railroad lands, to the west line of said block; thence north to the south line of Porter street; thence east to the place of beginning.

"2. Said Huxford, being so seized, afterwards, on the said first day of November, 1865, conveyed the said premises by good and sufficient deed of conveyance to Otis D. Weston.

Digitized by Google

"3. Afterwards, on the twelfth day of November, 1866, said Weston executed and delivered to one Gardiner W. Davis, a deed of said premises, with the following exception, viz.: Excepting and reserving therefrom sixty-eight feet of land off from the east end of said premises.

"4. Said Davis was at once put into possession by his grantor of the premises understood by the parties to have been conveyed to him, said Weston continuing in the possession and occupation of the portion understood to have been excepted. They agreed upon a line between their respective parcels, and dug a well and built a fence upon said line, sharing the expense. Said line cut off a strip of land sixty-eight feet wide from the east side of said premises, which was thereafter occupied by said Weston until the first day of November, 1872, or thereabouts. During such occupancy, he erected on said land a dwelling and a barn, worth in the neighborhood of $1,300.

"5. Said house and barn were completed in the spring of 1867.

"6. On October 1, 1872, said Weston executed and delivered to Lurany Barker a deed of the following-described premises, viz.: All that part or parcel of land situated in block fifty-seven in the village of Albion, county of Calhoun, State of Michigan, bounded as follows, viz.: Commencing at a stake one hundred feet west of the north-east corner of said block, running thence west sixty-eight feet, along the south line of Porter street; thence south to the north line of lands owned by the Michigan Central Railroad; thence, south-easterly, along the north line of said railroad, to a point south of the place of beginning; thence to the place of beginning,—and put her in possession thereof, being the same premises mentioned in the fourth finding of fact.

"7. Said Barker has continued in the peaceable possession of said premises, in person or by tenant, until the present time, the defendant being a tenant of hers, and in occupancy of said premises before and at the time this action was begun.

"8. On the first day of October, 1867, said Davis, for a valuable consideration, made and delivered to Samuel V. Irwin his promissory note for the sum of $1,000, together with a real-estate mortgage, to secure the payment of the same. The premises were described in the same manner that they were in the deed he had previously received from Weston.

"9. On the thirty-first day of March, 1883, said Irwin sold and duly assigned in writing said note and mortgage to

Digitized by Google

the plaintiffs, for a valuable consideration, said assignment being properly acknowledged, and duly recorded in the register's office for the county of Calhoun, on the twenty-sixth day of April, 1883.

"10. The plaintiffs proceeded to foreclose said mortgage by advertisement, and the premises were sold, by virtue of said proceedings, on the sixteenth day of July, 1883, to them; in pursuance of which sale, the sheriff of said county, on the same day, executed to them a deed of said premises, which deed was duly recorded in the proper office on the same day. The description in said deed was the same as that in the mortgage. All of the foreclosure proceedings were regular.

"11. In February, 1885, the plaintiffs demanded the surrender of the possession of the premises, by the defendant, at the same time exhibiting to him the sheriff's deed aforesaid. Defendant refused to yield possession."

From the foregoing facts, the circuit judge found, as the conclusion of law, that a piece of land 68 feet in width, off from the east end of the parcel described, was accepted in both the deed from Weston to Davis, and mortgage from Davis to Irwin, and that defendant should have judgment.

The contention of the plaintiffs is that the exception contained in the deed from Weston to Davis should be construed as reading as follows:

"Excepting and reserving therefrom sixty-eight square feet of land off from the east end of said premises,"—

Which would make a strip of land extending along the east end of the premises about six inches wide.

We think this construction wholly inadmissible. There was nothing in the situation of the parties, the subject matter, or the surrounding circumstances, which would render such construction at all reasonable.

The only object of construing a contract is to arrive at the intention of the parties. What the parties did immediately after the execution of the deed affords a safe criterion of their intention and of the meaning of the language used in the conveyance. Those facts are embodied in the fourth

Digitized by Google

finding, and they render it certain that the 68 feet excepted was to be a strip 68 feet in width off of the east end of the lot. The testimony of the witness to prove these facts was properly admitted in evidence.

The case is so plain that it does not call for any extended discussion.

The judgment is affirmed.

SHERWOOD, C. J., and MORSE J., concurred. CAMPBELL, J., did not sit.

---

68 64
153 639

DORCAS A. WINCHELL v. WILLIAM CLARK.

Deed—Water-rights—Erection of dam—Nuisance—Abatement.

1. The right of a land-owner to sever the right to a water-power from a particular portion of his land cannot be doubted. *Hall v. City of Ionia*, 38 Mich. 498, 499.
2. The unlawful flowing of land by the erection of a dam, and the consequent injury to the water-privileges of the land-owner, is a nuisance, which he has the right to abate by the removal of the dam.
3. This case involves the construction of deeds and the relative rights of several grantees to water-rights thereunder, and an examination of the entire opinion is essential to a correct understanding of the remaining questions decided.

Case made from Calhoun. (Hooker, J.) Argued November 10, 1887. Decided January 5, 1888.

Trespass for the removal of a dam alleged to be a nuisance. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

M. D. Weeks (*F. P. Monfort*, of counsel), for appellant.

Digitized by Google

N. B. Gardner (*Miner & Stace*, of counsel), for defendant.

MORSE, J. The plaintiff sued in justice's court for damages arising from an alleged trespass upon her property, in that the said defendant, with force and arms, entered her close, and tore down and destroyed a certain stone dam thereon, erected and maintained by her, and used to dam up the waters of the Kalamazoo river for manufacturing purposes.

The defendant gave notice that, at the time of the alleged trespass, he was in possession of the premises where the dam was located; that the dam wrongfully overflowed his premises, and that, if he committed any act as charged in the plaintiff's declaration, such act was only committed in lowering said dam so that it would not cause an overflow of his premises, which he had a right to do; that plaintiff had no right or title to erect a dam there, and no color of right or title to any water-power at or below the forks of the Kalamazoo river, and that such dam was erected and maintained by the plaintiff below such forks without right and unlawfully; and that the sole right to such water-power, and to erect dams at or below the forks, and all right of flowage incident thereto, were at the time of the alleged trespass, and now are, indefeasibly vested in him and his copartner, one Manly S. Amsden; and that the estate of the plaintiff, if she has any, is servient to the estate of himself and Amsden.

The case was thereupon certified to the circuit court for the county of Calhoun for trial.

The circuit judge filed the following findings of fact:

"1. On July 21, 1842, one George Hannahs became the owner of certain premises and water-rights on the Kalamazoo river at Albion, Calhoun county. The river is formed by the junction of two streams called, respectively, the East and West forks. The course of the river below the forks is

Digitized by Google

north-west. This included land on both sides of the river extending from a point north of Erie street, a street crossing the main river below the forks east and west, to a point some distance above Ingham street, a street crossing the East fork north and south some distance above the junction of the streams, a portion of that east of the river forming a triangle bounded north by Erie street, and south and west by the river and East branch.

"2. The conveyance of these lands also conveyed the following in these terms, viz:

"'Together with all the rights, privileges, and immunities of water-power on the East branch of the Kalamazoo river, with all the rights ever possessed by parties of the first part hereto of erecting a dam on said East branch of the Kalamazoo river, and also at or below the forks of said river: *Provided*, nevertheless, that such dam below or at the forks shall not arise higher than a level of two inches below the foot of the apron of the present dam on the South branch of said stream; hereby giving and granting all rights and privileges necessary for the erection and maintenance of said dam or dams on said East branch, and at or near said forks, as aforesaid, and of joining them to the opposite bank.'

"3. November 19, 1857, George Hannahs and wife conveyed to David and Walter Peabody a portion of these lands, viz.:

"The undivided two-thirds of the following, to wit: Beginning at the center of a culvert in the M. C. R. R., south of block 33, in the village of Albion, running thence southeasterly, along the south-westerly line of blocks 48 and 60, to the center of Erie street; thence to the center of the Kalamazoo river; thence north-westerly along the center of said river to a point opposite a stake standing at the mouth of a brook running under said culvert; thence northerly to said stake; thence north-easterly to the place of beginning. Also the undivided two-thirds of block 48 in said village.

"All of this land was included in the land described in the first finding, but it does not include the triangular piece of land therein described. Said deed further conveyed the undivided two-thirds part of so much land as may be necessary for the construction of one or more races or channels for water for the improving or using the water power, to be drawn from the East branch of the Kalamazoo river, or from said river at or below the forks thereof, extending from the center of Ingham street, with the necessary privileges of constructing, using, repairing, and enjoying the same.

Digitized by Google

"Also thereby giving, granting, and conveying the undivided two-thirds part of all the rights, privileges, and immunities possessed by the parties of the first part of the water-power on the East branch of the Kalamazoo river at or below the forks thereof, with the privilege of erecting and maintaining one or more dams on said East branch, and at or below the forks of said river, in accordance with the provisions of the deed to said George Hannahs: '*Provided*, that no such dam shall be erected or maintained in such a manner, nor of such a height, as to interfere with the use of the water-power at the Newburg mill, owned by M. Hannahs and Edwin H. Johnson, with the water as it flows from said mill; and provided, further, that such dam at or below the forks shall not be constructed so as to raise the water higher than a level of two inches below the foot of the apron to the present dam on the South branch.

"'The said party of the first part does also convey the undivided two-thirds part of all the rights and privileges necessary for the erection of such dam or dams on said East branch, and at or below the forks of said river, and joining the same to the opposite bank.'

"4. Said Walter and David Peabody thereafter constructed a race about 12 feet wide from a dam above Ingham street across said triangular parcel to Erie street, or north thereof, where they erected mills. The triangular parcel was not otherwise occupied.

"5. On January 21, 1859, George Hannahs executed and delivered to William Hannahs a mortgage upon the following, viz.: The undivided one-third of the Gothic Mills (being the same referred to in the third finding), with all the lands and appurtenances thereto belonging, known and described as commencing at the south-west corner of lot 7, in block 60, in Erie street, Albion village; thence west to the center of the Kalamazoo river; thence down the center of said river to the mouth of a brook which enters the said river near block 33; thence up said brook to the M. C. R. R.; thence east and south along said R. R., along the westerly side of blocks 38, 48, 55, and 60, to the place of beginning, including block 48, being what is known as the 'Reservation for Mill Purposes' on the east side of said river, with all rights of water-power connected therewith. (This does not include the triangular parcel described.)

"Also a piece of land known as the 'Reservation,' containing eight acres, lying between the Kalamazoo river above Erie street and the mill-race of Hannahs & Peabody. (This

Digitized by Google

is a portion of said triangular parcel.) Said mortgage included other premises not necessary to be described. The parcel described in plaintiff's declaration is a part of the triangular parcel of land, and is covered by this mortgage. Said mortgage was for $4,000, payable in installments, all to become due at option of mortgagee if default for 10 days was made in principal or interest.

"6. March 6, 1861, George Hannahs conveyed the undivided one-third of the premises to David and Walter Peabody, the description being in all respects the same as in his former deed to them. It did not include the triangular parcel, and was subject to the mortgage above referred to.

"7. February 18, 1865, the mortgaged premises were conveyed on foreclosure sale by commissioner to William Hannahs. The whole of the mortgaged premises appear to have been deeded, and both of the Peabodys were parties to the suit. It was conceded upon the trial that but one-third was conveyed. It was also conceded that the proceedings were regular. The descrip ion was identical with that in the mortgage. The parcel described in plaintiff's declaration was included.

"8. On February 20, 1865, George Hannahs and wife, by warranty deed conveyed, to Dorcas A. Winchell, the plaintiff, for $1,100, all of the land between the race and the river, and extending from Erie to Ingham streets.

"9. February 22, 1865, William Hannahs by quitclaim deed conveyed to Dorcas A. Winchell, the plaintiff, the same premises, specifically described as follows, viz.:

"Commencing at the center of the Kalamazoo river on the south line of Erie street; thence up the center of the river to the forks; thence up the South branch of said river to the line of Ingham street, or the west line of W. H. Brockway's lot; thence north to the race bank; thence down the south side of said mill-race to the south side of Erie street; thence west to the place of beginning,—containing about ten acres, be the same more or less, being known as the 'Reservation,' lying between the mill-race of Hannahs & Peabody (so-called) and the Kalamazoo river. The premises described in plaintiff's declaration are a portion of the lands above described.

"10. May 17, 1865, the plaintiff and her husband conveyed a portion of the ten acres above described to Joseph William Clark, the defendant, said parcel extending from the race to the center of the river, excepting and reserving the rights and privileges conveyed from George Hannahs and

Digitized by Google

wife by deed to David and Walter Peabody, November 19, 1867.

"11. November 30, 1866, Walter Peabody and wife conveyed their interest in the premises to David Peabody, the description being the same as that in the deeds from George Hannahs to them. This was a quitclaim deed.

"12. June 20, 1870, David Peabody and wife conveyed the same premises, by similar description, to James W. Sheldon. This deed provided that a mortgage held by Sheldon should not merge.

"13. July 8, 1871, a deed upon foreclosure was executed by the circuit court commissioner to James W. Sheldon. David Peabody, Augusta A. Peabody, Adeline S. Peabody, William Hannahs, Marvin Hannahs, John W. Hall, and Adeline S. Peabody, as executrix of Walter Peabody, were parties to the suit. The premises were described as in the deeds to the Peabodys.

"14. February 11, 1871, William Hannahs and wife quitclaimed the same premises by a similar description to said James W. Sheldon.

"15. March 10, 1881, said James W. Sheldon and wife deeded substantially the same premises, together with the water-privileges, by identical description, to Manly S. Amsden and Joseph W. Clark, the defendant.

"16. The premises described in the tenth finding bordered and included a portion of the river at and above the forks, and were higher up the stream than the premises described in plaintiff's declaration.

"17. Sometime after this deed was made and delivered to defendant, plaintiff erected a dam across said river, below the forks, extending from the premises described in her declaration to the opposite bank. Said dam was erected sometime from 1865 to 1868, there being no proof to fix the time more definitely. It was built without defendant's consent and against his wishes.

"18. This dam caused the water to flow defendant's land where water had not previously been accustomed to flow above said dam, to the injury of the grass growing thereon.

"19. This dam was maintained by the plaintiff until February, 1882, when it was torn down by the defendant without plaintiff's consent.

"20. At this time plaintiff was in possession of the premises described in her declaration.

"21. The plaintiff was damaged one hundred and seventy

Digitized by Google

dollars by the destruction of said dam, if defendant had no right to destroy the same."

His conclusions of law were as follows:

"1. November 19, 1857, George Hannahs was seized in fee simple of all the premises and rights of water described in findings of fact numbered 1 and 2.

"2. The effect of the conveyance from George Hannahs to David and Walter Peabody was to vest in them in fee-simple the undivided two-thirds of the premises and water-rights described in the third finding of fact (leaving the other one-third in said George Hannahs), called subsequently, for convenience, the 'Gothic Mill Property.' George Hannahs remained sole owner of the land between the race, when dug, and river, subject to such water-rights as he by said deed conveyed to the Peabodys, including the land afterwards conveyed to Winchell.

"3. The mortgage executed January 21, 1859, constituted a lien in favor of William Hannahs upon the premises subsequently conveyed to Winchell above referred to, and upon the undivided one-third of the premises and rights described in the deed to Peabody, belonging to George Hannahs.

"4. The deed of March 6, 1861, from George Hannahs conveyed to David and Walter Peabody the equity of redemption in the undivided one-third of the premises and rights, two-thirds of which had been previously conveyed by said George Hannahs to them. It did not convey the equity of redemption in the other premises included in the mortgage, the same remaining in George Hannahs.

"5. The effect of the foreclosure proceedings was to vest in William Hannahs the premises described in the mortgage, viz., undivided one-third of Gothic Mill property, and rights of water, and the premises afterwards conveyed to Winchell.

"6. The deed from George Hannahs to Winchell, February 20, 1865, conveyed at most an equity of redemption in the premises therein described. She became owner in fee-simple of the same on receiving deed from William Hannahs, February 22, 1865, subject to the water-rights.

"7. On February 22, 1865, the title was as follows, viz.: David and Walter Peabody owned undivided two-thirds of the Gothic Mill property with water-rights, including right to erect two dams. William Hannahs owned undivided one-third of same. Dorcas A. Winchell owned the land between the race and the river (*i. e.*, thread of stream) from Erie to

Digitized by Google

Ingham streets, subject to the rights of Peabodys, which neither Hannahs could convey. The deed from William Hannahs at *most* conveyed to Winchell the premises discharged of his share or interest in pre-existing water-rights. It did not convey any of these rights beyond those which ordinarily attach. Winchell acquired no right to flow any other land than her own, nor any right to connect a dam with the opposite bank, nor to erect a dam beyond the thread of the stream. The rights of the Peabodys were unimpaired, and, whether they could abut a dam against Winchell's premises or not, they undoubtedly had right to flow same by erection of dam on their own land below.

"8. May 17, 1865, deed from Winchell to Clark conveyed estate in fee-simple to defendant, construed in light of existing circumstances. Winchell excepted from the conveyance the rights of Peabodys' two-thirds interest, but made no attempt to reserve or except the other one-third of the water-right. She has no right to flow defendant's land under that deed.

"9. The effect of the deed from Walter Peabody to David Peabody, dated November 30, 1866; that from David Peabody and wife to James W. Sheldon, dated June 20, 1870; the mortgage therein described; the commissioner's deed on foreclosure, dated July 8, 1871; and the quitclaim deed from William Hannahs, dated February 11, 1871,—was to vest the fee to the mill property and mill privileges in James W. Sheldon, except as discharged by the deed from Hannahs to Winchell before mentioned, to which rights Manly S. Amsden and the defendant succeeded by deed dated March 10, 1881.

"10. Amsden & Clark have the legal right to build a dam below or at the forks wherever they have or may acquire the right to join the east bank of the stream.

"11. The dam erected by the plaintiff invaded their rights to the water-privilege, and was unlawful as against them.

"12. Clark having purchased the interest of the Peabodys, the effect is to give him the right to prevent the parcel bought from Winchell from being flowed by any one except his partner, Amsden.

"13. In flowing this land and injuring the water-privilege, plaintiff's dam became a nuisance which defendant might lawfully abate.

"14. Defendant's acts being lawful, judgment should be rendered in favor of the defendant for costs."

Digitized by Google

The first question to be examined and decided is whether the plaintiff, under the conveyances to her, acquired any right to the water-privileges below the forks of the Kalamazoo river, and which were originally, as far as this record shows, in George Hannahs.

I have set forth in full the findings of the fact, as the facts therein are stated as clearly and concisely as they well could be.

Mrs. Winchell derives her title to the land she holds through the mortgage executed by George to William Hannahs.

At the time this mortgage was made and delivered, George Hannahs had been dispossessed of two-thirds of these water-privileges by his own voluntary deed to the Peabodys. In such deed he expressly conveyed these water-rights by describing them, and independently of the usual clause in a deed granting the "hereditaments and appurtenances thereunto belonging or in anywise appertaining," which clause was contained in this deed, and following the description of the lands and the water-rights conveyed. The mortgage also contained an express mention of the water-privileges, although there was no specific description of the same. The commissioner's deed upon foreclosure sale followed the mortgage in this respect. In examining the description of the lands in the mortgage, and also in the commissioner's deed, it is found that the parcel of land conveyed to Mrs. Winchell, and known as the "Reservation," lying between the mill-race and the Kalamazoo river, is described separately by itself, and following, and not connected with, the sentence conveying the water-rights; the clause granting such rights being connected expressly with and to other lands.

The warranty deed of George Hannahs and wife, and the deed of William Hannahs, to plaintiff, make no mention whatever of any water-rights or privileges. It would seem as if there was no intention of granting any such rights with the lands conveyed to plaintiff.

Digitized by Google

We are inclined to think that the claim of defendant's counsel is correct, that the water-privileges were intended to be, and were, severed and disconnected from this parcel of land by George Hannahs. This land did not pass to the Peabodys by the deed which granted to them two-thirds of these water-rights. And, as before said, in the mortgage the remaining one-third was expressly mentioned as being appurtenant to other lands, and had no relation or connection in that instrument with this reservation land.

The water-rights did not expressly pass to plaintiff by either of the deeds under which she holds. The most that her counsel claim is that it passed under the general appurtenant clause of William Hannahs' deed; for, when George conveyed to her in 1865, he had before that time expressly conveyed the remaining one-third to the Peabodys by a deed executed in 1861, and his title was also cut off by the mortgage foreclosure.

The deeds from George and William to Mrs. Winchell seem to bear out the claim that at the time these deeds were made the intention of the parties was to simply convey to her the bare land, without any water-rights as far as building dams and using water-power were concerned. The subsequent action of William Hannahs in deeding this right to others confirms this claim.

It will also be seen from the first paragraph in the finding of the court that the right to all this water-power was specifically described in the deed by which George Hannahs obtained it, and such right was not made expressly appurtenant to this parcel of land or any other. The right of the Hannahs to sever this right to the water-power below the forks of the Kalamazoo river from this particular piece of land cannot now be doubted. *Hall v. City of Ionia*, 38 Mich. 493, 498, 499 and cases there cited.

It will be seen by the third paragraph of the findings of fact that in 1857, when the conveyance of two-thirds of this

Digitized by Google

water-right to the Peabodys was made, there was already located upon the east or north branch of the river, above the forks, a water-power known as the "Newburg Mill," with the use of which the Peabodys could not interfere by the express terms of the grant to them, and also a dam upon the south or west branch, which restricted their use of the river at or below the forks so that any dam they might erect should not be constructed so as to raise the water higher than a level of two inches below the foot of the apron to such dam upon the south or west branch.

The race constructed by the Peabodys, and in full operation before the plaintiff obtained title or possession of her premises, ran from a dam on the east or north branch to a point below the forks, and below the plaintiff's land, to help propel mills there erected and operated by the Peabodys.

It may well be claimed, as it is by defendant's counsel, that the existence of these two dams, restricting the use of water-power at and below the forks as provided in the conveyance to the Peabodys, and the subsequent erection of these mills below the forks, and the building and maintaining of the race, and the conveyances by all the parties, are circumstances which, taken together, show an abandonment on the part of the owners of these water-rights of any idea of building any dam or using any water-power upon the river where it abuts the land conveyed to plaintiff, and that the full use of the water-power intended under the different grants of the same, and by the owners of the water-rights, had been put in operation by the Peabodys in the building of the mills and the race aforesaid. They undoubtedly had the right to control the water in this way, if they saw fit, and, by withholding from Mrs. Winchell any right in the use of the water for mill or manufacturing purposes, in their deeds to her, prevent her from using any of the water-power, which they held absolutely and not appurtenant to any land. It is not claimed that she ever had any right to the two-thirds first deeded to

Digitized by Google

the Peabodys, and William Hannahs, who held the other third, could convey it or not convey it to her, as he chose. The deed of the land did not pass it, as has been shown, and it was in our opinion never appurtenant to the premises held by her or any part thereof.

It follows further, in accordance with this view, and under the findings of the court, that this water-right or privilege is now the property of the defendant and his partner, Amsden.

The defendant, Clark, obtained the strip of land bordering upon the river above the premises occupied by the dam of plaintiff, before said dam was built, and acquired such strip of the plaintiff. When he bought, therefore, his land was not burdened by any flowage from this dam, and his deed imposed no servitude upon his premises, except the water-rights of the Peabodys, which he and his partner now hold.

The dam of plaintiff, at the time it was destroyed, had not been maintained long enough for her to acquire a right by adverse user to keep it there. It is not shown to have been built, for a certainty, before 1868, and it was torn down in 1882.

The circuit judge was right in holding, as a conclusion of law, that the dam erected by the plaintiff invaded the rights of Clark & Amsden to their water-privileges, and that its maintenance as against them was unlawful.

He was also correct in the proposition that the flowing of defendant's land and the injuring of his water-privileges by the dam of plaintiff was a nuisance which he had the right to abate. Wood, Nuis. (2d ed.) 976, 977; *Adams v. Barney*, 25 Vt. 231; *Hodges v. Raymond*, 9 Mass. 316; *Colburn v. Richards*, 13 Id. 420; *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 195.

The judgment of the court below is affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

JOHN P. MILLER v. REBECCA BECK AND FRANCIS FELLMAN.

Ejectment—Pleading—General issue—Adverse possession—Charge to jury.

1. In an action of ejectment, title by adverse possession may be shown by the defendant under a plea of the general issue.
2. A circuit judge has a right to presume that an ordinary jury has ordinary intelligence, and that the word "adverse," in *itself*, means "hostile and distinct," when applied to qualify or define a possession of lands.

Ejectment. Plaintiff brings error. Affirmed and record remanded, etc. The facts are stated in the opinion.

Error to Ingham. (Gridley, J.) Argued November 9, 1887. Decided January 5, 1888.

H. B. Carpenter, for appellant.

Frank L. Dodge, for defendants.

MORSE, J. This is an action of ejectment to recover possession of a strip of land in the city of Lansing, a few inches wide, upon which rests the outer and rear wall of a brick store owned by the defendant Rebecca Beck.

Samuel Beck purchased in 1869 a parcel of land off the north end of lot six, block 100, in the city of Lansing, 20 feet north and south by 66 feet east and west. This is now the property of Rebecca, his widow. When Samuel bought the land there was a wooden building upon it, which was burned in August, 1870 or 1871. The year it was burned, Samuel Beck erected a three-story brick building, 20 feet wide by 60 feet long. The six feet remaining at the rear was excavated, and used as an area to give light to the cellar.

Digitized by Google

A wall was built around this area. The brick building so erected by Samuel Beck was burned in 1885, and in the spring of that year a two-story brick building was erected on the site of the former store, but it was built six feet longer, thus occupying the space before used for an area.

Plaintiff owns a parcel of land next south and adjoining the Beck lot, and also owns 22 feet further east, and also a lot 20x22 feet east of the Beck store. He claims that the rear or east wall of the defendant's store was placed in part, by mistake, upon his land to the extent of from three and one-half to five inches. On the ninth day of September, 1886, he brought this suit.

The defendants claim that the rear or east wall of the brick store does not encroach upon the land of plaintiff, but that, if it does, the few inches of land in dispute have been occupied adversely by Samuel Beck and his grantee, the defendant Rebecca Beck, for a sufficient length of time to bar the plaintiff's rights therein. The testimony shows that this rear wall was built exactly in the same place occupied by the old wall of the area. Louis Beck, son of Samuel and Rebecca, testified that he thought the first brick store and the area wall was built in the fall of 1870, but was not sure but it might have been in 1871. No other testimony appears as to the time it was built.

It seems to be undisputed that from the time the area wall was built the land occupied by it was held and claimed by the Becks, and occupied by them without interruption until the commencement of this suit.

The jury found a verdict for the defendants.

The only errors assigned are directed against the charge of the court. It is submitted that the court erred in permitting the jury to find title in the defendant by adverse user and possession—

1. Because the statute of limitations relied upon was not pleaded.

Digitized by Google

2. Because it was not certain from the testimony of Louis Beck when the occupation began. If it was in 1871, the 15 years of the statute had not expired when this suit was brought.

Neither of these objections is tenable. A plea of the general issue is sufficient, in an action of ejectment, to admit, without notice, the defense of title by adverse possession. Tyler, Ej. 463, 464; How. Stat. §§ 7808, 7809; *Hughes v. Graves*, 39 Vt. 358; 3 Washb. Real Prop. 163, 164; *Nelson v. Broadhack*, 44 Mo. 596; *Dalby v. Snuffer*, 57 Id. 294; *Wood v. Jackson*, 8 Wend. 9; *Howard v. Mitchell*, 14 Mass. 243. It was for the jury to determine from Louis Beck's testimony when the adverse possession began.

It is also argued by the plaintiff's counsel that the circuit judge should have defined more clearly to the jury the meaning of the term "adverse," as applied to defendants' possession. He insists that the average juryman is entirely unacquainted with the legal meaning and import of the word.

It does not appear from the record that the counsel requested the court to define or declare the meaning of adverse possession any more fully or specifically than he did. Nor does it seem to us that the jury could have been misled by the instructions of the court. It was very apparent and clear from the testimony that the possession of the Becks included all the legal elements of an adverse holding, and the only question to be decided by the jury was the length of time such holding had existed before suit.

The circuit judge instructed the jury more than once that the premises must have been occupied by the Becks for the space of 15 years by an open and notorious possession,—one that was adverse to the plaintiff,—in order to bar the recovery of the plaintiff. There was no dispute about the continuity of the possession of the Becks, and the only fault the plaintiff's counsel can find with this charge of the court is that he did not tell them that this possession, in order to be

Digitized by Google

adverse, must have been distinct and hostile to the rights of the plaintiff in the land.

The circuit judge had a right to presume, we think, that an ordinary jury has ordinary intelligence, and that the word "adverse," in itself, means "hostile and distinct," when applied to qualify or define a possession of lands. At any rate, the evidence is undisputed that this possession was held under a claim of right, and that it was open, notorious, continued, distinct, and hostile, and the verdict of the jury was right as to the character of the possession. If the attention of the court had been called to this matter, he would, without doubt, have clearly specified and set forth all the distinctive elements needed to establish an adverse possession; but, under the proofs, his failure to do so could have resulted in no possible harm to plaintiff.

The judgment is therefore affirmed, with costs. The record will be remanded for further proceedings under the statute if desired.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

JAMES CILLEY AND LAFAYETTE HATCH v. BARNEY VAN PATTEN.

[See 58 Mich. 404.]

Justices of the peace—Jurisdiction—Trial—Evidence—Assumpsit by joint owners of claims—Loss of execution—Parol evidence.

1. A plaintiff has the right to offer proof of such of several claims as he chooses, or none as to some items.
2. The sum claimed in the *ad damnum* determines the jurisdiction of a justice of the peace in an action of assumpsit.
3. It is the privilege of a plaintiff, in any case, to forgive to the defendant so much of his claim, as established on the trial, as he may choose.
4. A party owning chattel property or choses in action is presumed to know it, and may testify to such *fact*, and the means of his knowledge can be disclosed upon cross-examination, if the defendant so desires.
5. The *joint* ownership of a negotiable promissory note, indorsed in blank and put in evidence without objection, may be shown by, evidence of its purchase of the payee by the plaintiffs.
6. Parol evidence is admissible of the contents of a *lost* executions and of a levy and sale thereunder, and of the return of the officer making the same.

Error to Ottawa. (Arnold, J.) Argued November 10, 1887. Decided January 5, 1888.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

O. C. Howell, for appellant.

George A. Farr, for plaintiffs.

SHERWOOD, C. J. The plaintiffs brought their suit in assumpsit against the defendant in justice's court, and recovered a judgment of $300. On appeal to the circuit,

Digitized by Google

the plaintiffs recovered a like judgment. The proceedings and judgment in the circuit came to this Court on error, where the judgment was reversed, at the October term, 1885 (58 Mich. 404, 25 N. W. Rep. 326), on the grounds that certain proofs made of plaintiffs' claim were not admissible under their declaration, and that the defendant was not allowed to make proof of certain items which he should have been permitted to do. The plaintiffs were allowed a new trial, which has been had, and the proceedings upon that trial are now before us for review.

It appears from the record that the plaintiffs amended their declaration before the last trial, in order to avoid the objection upon the former trial, and which proved fatal, and they then succeeded, recovering the same amount as before.

The items claimed for under the declaration now before us are:

1. A note given by the defendant for $33, dated November 15, 1879, and owned jointly by the plaintiffs.
2. A personal account of plaintiff Cilley against defendant, owned by the plaintiffs.
3. A personal account of Hatch against the defendant, owned by the plaintiffs.
4. A claim for a quantity of slabs owned by plaintiffs and sold by defendant.

The plea was the general issue, with notice of set-off.

The trial was before Judge Arnold, and a jury, in the Ottawa circuit.

The defense claimed against the note was that it was given to the payee (one Nelson) for work and labor to be performed by him, and which he never did; and, further, that defendant is entitled to set off against the note such claim as accrued to him against Nelson while the latter owned it.

To the claim made by plaintiffs for the Cilley account, the defendant urges, as a defense, that the account was originally due to the plaintiff Cilley, and that a portion of the services charged for by him against the defendant were never per-

Digitized by Google

formed, and, as to certain other services, defendant never employed Cilley for that purpose, and that he has paid Mr. Cilley more than $33.79, and claims an offset of about $40 against the plaintiff's claim.

In regard to the item for slabs, the plaintiffs claimed that plaintiff Hatch and one Thirkettle owned a quantity of slabs at Port Sheldon, in the county of Ottawa, to the amount of about 200 cords; that plaintiff Cilley sold the same, or rather Thirkettle's interest, on an execution against Thirkettle, and that the former became the purchaser at the sale, and the plaintiffs became the owners thereof; that afterwards, without any authority, the defendant sold a large quantity of these slabs, and received the money therefor, at seventy-five cents and a dollar per cord.

The defense claimed against this item is that Thirkettle and Hatch had no such amount of slabs; that he never sold any slabs belonging to the plaintiffs; that he never got any money for the slabs plaintiffs claim that he sold; and that the plaintiffs cannot recover upon any demands in which they are not joint owners.

No proof was offered in support of the plaintiffs' third claim, and it will not be regarded in the further discussion, unless referred to in connection with one of the other three claims, in support of and against which testimony was offered on both sides.

We shall notice only those errors assigned, and which were argued on the hearing, or in the brief of defendant's counsel. It was the plaintiffs' right to offer proof of such of their claims as they chose, or none as to some of the items, and it is no ground of error that they did so.

The aggregate sums to which the several claims of the plaintiffs amounted exceeds the sum of $100, but the *ad damnum* in the declaration is within the jurisdiction of the justice. This, however, furnished the defendant with no ground for an objection to the jurisdiction of the court. It

Digitized by Google

is the amount claimed in the *ad damnum* that determines the jurisdiction of the justice in assumpsit. It is the privilege of the plaintiff, in any case, to forgive so much of his proved claim, upon the trial, to the defendant as he may choose. It appears they did not, in this case, prove one of their claims, but had it stricken from the declaration, and abandoned it as outlawed. The defendant was not prejudiced by this course.

It was not improper to allow Hatch to testify that he and Cilley owned the Cilley claim for services against the defendant. A party owning property consisting of chattels or choses in action is presumed to know it, and I think he may testify to the fact where it is material. The means of his knowledge can be very easily disclosed upon cross-examination, if the defendant desires. There was no error committed in receiving this testimony.

The note sued upon was a negotiable note, and put in evidence without objection, and the proof showing joint ownership of the same was unobjectionable. Hatch testified that he and Cilley bought the note of the payee in 1880.

There was proof tending to show that Cilley purchased the Thirkettle interest in the slabs at an execution sale thereof, and we find no error in the admission of the evidence to prove the validity of the judgment and the execution sale.

When the files of the court are lost, as in this case, the next best evidence attainable may be resorted to in proving their contents, and that was done in this case, and the testimony upon the subject was proper to be submitted to the jury, both as to the loss and contents.

There was testimony tending to show the ownership by the plaintiffs of each of the claims which were allowed to remain in the plaintiffs' declaration, and that such ownership was joint, and the value of the claims; and we find no error in the admission of the testimony offered for the purpose of proving the same, and the finding of the jury thereon is against the defendant, and conclusive, unless the charge of the court misled them in applying the law.

Digitized by Google

The charge has been looked into, and we have failed to discover any fault in it. It is full upon every legal phase of the case, and upon every point is clear and correct. It gives all that was proper for the jury to know of the defendant's seven rejected requests, and it is not easily seen how the defendant's, as well as the plaintiffs', rights could have been better guarded, or the jury better informed upon the law of the case, than was done in the charge of the learned circuit judge.

The judgment must be affirmed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

---

68 84
76 301

CELIA HATCH v. CHARLES CHRISTMAS.

Justices of the peace—Adjournment of cause—Certiorari—Replevin —Failure of sureties on bond to justify.

1. In the absence of a *specific* allegation in an affidavit for *certiorari* that no showing was made on oath as a basis for an application for an adjournment in justice's court, if the return shows that the adjournment was duly applied for upon showing made, the presumption is that the showing was legally made, and upon sufficient grounds.
2. The three months for which a justice of the peace may adjourn a case date from the return-day of the process by which suit was commenced.
3. The failure of the sureties in a replevin bond to justify their pecuniary responsibility in writing indorsed on the bond is not a jurisdictional defect, the statute permitting a new bond to be filed where objection is seasonably made.

Error to Ottawa. (Arnold J.) Argued November 10, 1887. Decided January 5, 1888.

Replevin. Defendant brings error. Judgment of circuit

Digitized by Google

court, affirming justice's judgment, affirmed. The facts are stated in the opinion.

C. C. Howell, for appellant.

George A. Farr, for plaintiff.

CHAMPLIN, J. This suit originated in justice's court, and was removed to the circuit court by a writ of *certiorari*, where the judgment of the court below was affirmed.

The assignments of error contained in the affidavit for *certiorari* are all rendered unimportant by the return of the justice to the writ, excepting the fifth, which reads as follows:

"That the justice erred in adjourning said cause to the twenty-eighth day of January, 1887."

The reasons alleged why such adjournment was erroneous are—

"1. That no showing was made for an adjournment, by the oath of the plaintiff or otherwise, that the plaintiff could not safely proceed to trial for the want of some material testimony or witness.

"2. That the case was adjourned more than three months, and therefor the justice lost jurisdiction."

First. How. Stat. § 6899, provides:

"If either party to the suit shall make it appear to the satisfaction of the justice, by his own oath, or the oath of any other person, that he cannot safely proceed to trial for the want of some material testimony or witness, the justice shall postpone the trial," etc.

The return of the justice to the writ of *certiorari* upon the question of adjournment is that C. C. Howell appeared before him specially on the return-day, and moved to quash the writ of replevin for an alleged defect in the affidavit, which was overruled;—

"And that immediately thereupon the said plaintiff, Celia Hatch, by her said agent, duly applied, upon showing made,

Digitized by Google

for an adjournment of said cause without pleading to the twenty-eighth day of January, in the year 1887, at one o'clock in the afternoon, at my said office, which application I granted, and ordered that the said cause stand adjourned until the twenty-eighth day of January, in the year 1887, at one o'clock in the afternoon, at my said office; and that said plaintiff, at the last said time and place, did declare in said suit."

His return further shows that defendant did not thereafter appear.

The defendant's attorney, in his affidavit for *certiorari*, did not allege or point out that the adjournment was had without any showing made upon oath or affidavit. He merely states—

"That said cause was then, at the request of the plaintiff, and without the consent of the defendant, adjourned to the twenty-eighth day of January, 1887, at one o'clock P. M., and without even pleading in the case."

I do not think, upon this return, the objection now raised upon this ground is open to the defendant. When there is no specific allegation that no showing was made on oath as a basis of the application for adjournment, and where the return shows that the adjournment was duly applied for upon showing made, the presumption is that the showing was legally made, and upon sufficient grounds. *Deitz v. Groesbeck*, 32 Mich. 303.

The defendant applied to the circuit court for a further return upon certain specified facts, but did not ask a further return upon the facts he now seeks to impeach the legality of the adjournment upon. The return must therefore be held to be a sufficient answer to the point now made.

Second. The return-day of the writ of replevin was the eighth day of November, 1886. The three months in which postponements may be had date from the return-day. The case was not therefore adjourned beyond the authorized period.

Digitized by Google

The fact that the sureties did not justify their responsibility in writing indorsed upon the bond in the replevin suit was not jurisdictional. The statute permits a new bond to be filed where such objection is seasonably made. How. Stat. § 7046. The justice returns that no such objection was made before him.

There being no other errors available to defendant, the judgment is affirmed.

SHERWOOD, C. J., and MORSE, J., concurred. CAMPBELL, J., did not sit.

JAMES F. WALLACE ET AL. v. JOHN BAHLHORN AND FREDERICK BAHLHORN.

68 87
j156 507

Landlord and tenant—Lease.

The fair construction of a lease for a term of one year from a given date, with the privilege of longer lease, if both parties are suited, for a term of eight years, reserving the right to sell part or all is that the lease should terminate upon a sale of the premises, or, if of a portion of them, as to the part sold.

Error to Wayne. (Chambers, J.) Argued November 10, 1887. Decided January 5, 1888.

Proceedings to recover possession of land. Defendants bring error. Affirmed. The facts are stated in the opinion.

F. A. Baker (*Albert Hosmer*, of counsel), for appellants.

Palmer & Palmer, for complainants.

MORSE, J. In this case a complaint was made before a circuit court commissioner to recover possession of a farm, situated in the township of Brownstown, Wayne county.

Digitized by Google

Complainants alleged the relation of landlord and tenant existing between the parties, and an unlawful holding by the defendants. Defendants pleaded not guilty. Upon a trial, the commissioner gave judgment for the defendants.

Upon appeal to the Wayne circuit court, Circuit Judge F. H. Chambers made the following findings of fact and conclusions of law, and entered judgment for complainants:

FINDINGS OF FACT.

"David Wallace entered into a contract in writing with defendants on the sixteenth day of December, 1879. The clause in dispute in this lease reads as follows: 'For the term of one year from the first day of April next, with the privilege of longer lease if both parties are suited (for a term of eight years, *reserving the right to sell part or all*).'

"That, under said contract, said defendants entered into possession of the premises therein described, and cultivated said farm, and paid the rent, in accordance with its terms, and have remained in possession of said farm ever since, and were holding the same at the commencement of this suit, to wit, April 7, 1887.

"David Wallace and his wife signed and executed a quitclaim deed of said premises to the plaintiffs, a copy of which deed is hereto attached, marked 'Exhibit B,' and delivered the same to the grantees, who were the plaintiffs in this suit, on the seventeenth day of November, 1886; and, at the same time, grantees paid David Wallace therefor the sum of three dollars, and promised to give their sympathy and good will to grantors. The grantees were nephews and nieces of grantors; said grantors had no children.

"That, after said deed was delivered to the grantees, and on the eighteenth day of November, 1886, plaintiffs James F. Wallace, Jacob Wallace, and Charles H. Crane, who were the agents of the other grantees, gave notice to defendants that they, the grantees, had bought and owned the farm on which the defendants were living; and that their lease or tenancy would terminate at the close of the year, which ended April 1, 1887; and that they would be required to surrender the said premises to them at that time.

"The defendants admitted that they were to leave the farm when it was sold; and agreed to move off from it in the spring. The defendants refused to quit or deliver up said premises at the close of the year, or in the spring; and the

Digitized by Google

grantees in said deed commenced this suit on the seventh day of April, 1887, to recover the possession of the premises described in said deed, which are the same as those described in said contract or lease of David Wallace to defendants.

"The court finds, also, that the defendants agreed that, if David Wallace sold said premises, such sale should terminate said lease. Said premises were sold by David Wallace to plaintiffs, and by said David Wallace and wife conveyed to them by said deed, 'B.'

"The court finds as conclusions of law:

"1. That the contract, of which Exhibit 'A' is a copy, was a lease of the premises therein described, for one year only, and a conditional contract for a future letting.

"2. That the holding over after the first year by the defendants, on the same conditions, and the acceptance of the rents by the lessor, constituted a tenancy at will, from year to year.

"3. That the notice given by the plaintiffs on the eighteenth day of November, 1886, terminated the defendants' tenancy and lease of said premises before the commencement of this suit, and the defendants were holding the same after the termination of their lease, when this suit was commenced.

"4. If the contract from David Wallace to defendants constituted a lease for eight years, under its conditions, said sale of said premises terminated it.

"The court therefore finds, from the facts as above stated, and the conclusions of the law as above set forth, that the plaintiffs are entitled to recover a judgment of restitution of said premises, and costs, against the said defendants.

"F. H. CHAMBERS, Circuit Judge.

Detroit, July 19, 1887."

The judgment entered in the case by the circuit judge is correct, and must be affirmed.

We think the fair construction of the lease is that it should terminate upon a sale of the premises, or [if of] a portion of them, as to the part of the farm sold. A sufficient sale is found by the court. It seems, also, from the findings of fact, that the defendants understood the lease as we construe it, and promised, when notified of the sale, to move off of the farm in the spring of 1887.

It is not necessary to discuss or decide the question whether

Digitized by Google

the instrument was a lease for the whole term of eight years, or nothing more than an agreement to execute a new lease for the longer term. As the court properly concluded, if it was an agreement to execute a lease, the defendants, at the time of the sale, were holding as tenants at will from year to year, and the notice to quit was sufficient.

The judgment of the circuit court for the county of Wayne is affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

68 90
91 289

68 90
d116 373

68 90
d126 80

68 90
d128 478

OSCAR BAKER, AN INFANT, BY JAMES H. BAKER, HIS NEXT FRIEND, v. THE FLINT & PERE MARQUETTE RAILROAD COMPANY.

Negligence—Injury to infant—Contributory negligence.

1. The *right* of a child to cross a railroad track is accompanied with the duty to use *reasonable* and at least *ordinary* care in so doing, his age, experience, and intelligence being taken into consideration with the other circumstances existing at time of his injury; and if, after a proper consideration of *these* things, the jury shall find that the child had sufficient intelligence—and experience if that shall be found necessary—to know of the danger, of the signals and the warnings against it, and the manner in which an injury might be produced by a failure to observe such signals and warnings, they are warranted in considering the question of contributory negligence; and if they find that the accident occurred by reason of the failure of the child to observe such warnings and signals and indications of danger, and of his neglect of the duty thereby imposed upon him to avoid the danger, and injury ensues, his negligence will be such as to prevent a recovery therefor.

2. *Ordinary care* has relation to the situation and condition of the parties, and varies according to the exigencies which require vigilence and attention, and, when contributory negligence is

Digitized by Google

sought to be attributed to a child, he can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment.

3. In a suit for injuries to a child by a railroad train, where his contributory negligence is a question for the jury under the evidence, it is the province of the jury to judge of his capacity and ability, and the manner in which he used the same on the occasion when the accident occurred, and whether he was of sufficient age and judgment to have used them otherwise, so as to have avoided the calamity which overtook him.

4. Under the testimony in this case, the action of the court in leaving it for the jury to say whether or not the evidence satisfied them that the plaintiff had such judgment and compression as enabled him to appreciate the danger he incurred, and subject him to the consequences of negligence if he failed to use his reason and senses in seeking to avoid it, is sustained.

Error to Bay. (Gage, J., presiding.) Argued November 10, 1887. Decided January 5, 1888.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

William L. Webber (*Wisner & Draper*, of counsel), for appellant.

W. C. Green (*J. E. Simonson*, of counsel), for plaintiff.

SHERWOOD, C. J. The plaintiff in this case, a boy seven years and three months old, brings this action to recover damages for personal injuries received by him from being run over by the defendant's train of cars on the evening of the fifth day of November, 1886, at Eleventh street, in Bay City, whereby he was seriously injured, and from the effects of which amputation of one of his legs became necessary.

The cause was tried in the Bay circuit court, and the plaintiff recovered a verdict and judgment for the sum of $5,000 damages. The defendant brings error.

The defendant's road enters Bay City near its most southern limit, and runs in a northerly direction, through

Digitized by Google

the central portion of the city, several miles, to its northern boundary.

The train doing the injury was going north, and in passing from Twenty-third street to Thirteenth street the road runs due north on James street. Leaving Thirteenth street on a curve to the east, and running about 100 feet, the track enters Jefferson street, passing within three or four feet of the north-west corner of it and Twelfth street, still curving to the east until it reaches a point about 100 feet south of the north line of Eleventh street, the place where the plaintiff, in crossing the track, was struck by the train and injured. There is a depot here, where all passenger trains make short stops, but the principal depot of the company in the city is about 3,200 feet further north on Jefferson street. On either side of the track there were buildings, fences, and structures of various kinds, and also trees between Eleventh and Twelfth streets. From the point where the boy was struck, in Eleventh street, the train could be seen crossing Twelfth street,—a distance of over 400 feet.

This is a sufficient statement of the surroundings for the further consideration of the case.

There was testimony showing that the boy was a bright, active, intelligent lad for one of his age. This was among the five special findings of the jury, which are given in the record, as follows:

"*Q.* Do you find from the evidence that the train was in sight for a distance of 400 feet, being when it was crossing Twelfth street, before it reached the place of the accident; and that it could be seen approaching the whole of that distance from any point between the south-east corner of the depot platform and the main track at the place where the accident occurred?

"*A.* We will answer that, for ourselves, we can see the engine as it approaches the intersection of Twelfth street and said railroad track.

"*Q.* Do you find from the evidence that the plaintiff was a bright, active, intelligent boy at the time he was injured?

Digitized by Google

"*A.* Yes; as an ordinary boy.

"*Q.* Do you find from the evidence that the plaintiff had sufficient intelligence to know that it was dangerous to run upon or across a railroad track in front of an approaching train?

"*A.* Yes; between Eleventh and Twelfth streets.

"*Q.* Do you find from the evidence that plaintiff saw the train approaching before he went upon the track?

"*A.* No.

"*Q.* If you answer 'No' to the fourth, then do you find from the evidence that plaintiff could have seen the train if he had looked in the direction from which it was coming before he ran upon the track?

"*A.* Yes; between Eleventh and Twelfth streets."

The declaration contains two counts. The first count charges the defendant with negligence in running its train faster than six miles per hour, contrary to a by-law of Bay City, and that it is therefore liable; and the second count charges the defendant with negligence in running its train at the time the boy was injured at an unusual and dangerous rate of speed, by which the plaintiff was injured, while he himself was using due care in crossing the track at Eleventh street; so that it will be seen that the only negligence charged against the defendant in either count of the declaration was running its train at too high a rate of speed.

The testimony shows, and it is not controverted, that the plaintiff had been playing about the depot and track, some little time before the train came in, with two other boys, and that the boy, in his play, with the others, had, but a short time before he was injured, crossed the track at the same place, and that, at the time the train struck him, the two boys with him had just crossed the track, and he was running when crossing it to catch up with his young comrades in their play; that he did not look for the train, or in the direction from which it was coming, neither did he hear any signals of its approach until it struck him; that he knew the cars would hurt him, and tried to get back off the track, but failed, before he was injured; and that he could have seen the

Digitized by Google

train at Twelfth street if he had looked, and if he had seen the train he would not have gone upon the track. This was the uncontradicted evidence, given by the boy, most favorable to the defendant.

There is no question but that it was this boy's right to cross the railroad track at any time when he would not be injured by teams, wagons, cars, or other things going upon or across the street; and this right is accompanied with the duty to use reasonable and at least ordinary care on the part of the child,—his age, experience, and intelligence being taken into consideration with the other circumstances existing at the time the accident occurred.

If, when these things have all been properly considered by the jury, they shall find that the child has sufficient intelligence (and experience, if it shall be found necessary) to know of the danger, of the signals and warnings against it, and the manner in which an injury may be produced by failure to observe such signals and warnings, they are then warranted in taking the subject of contributory negligence under consideration; and when the child has been injured by a failure to observe such warnings, signals, and indications of danger, and neglected the duty they impose upon him to avoid the danger, and injury ensues, his negligence will be such as to prevent a recovery therefor. This I understand to be the rule in this Court, as settled by our own authorities, as well as by decisions in other states. *Railway Co. v. Bohn*, 27 Mich. 503; *Daniels v. Clegg*, 28 Id. 40; *Hassenyer v. Railroad Co.*, 48 Id. 209 (12 N. W. Rep. 155); *Powers v. Harlow*, 53 Id. 515 (19 N. W. Rep. 257); *Hargreaves v. Deacon*, 25 Id. 1; *Railway Co. v. Smith*, 46 Id. 504 (9 N. W. Rep. 830); *Downey v. Hendrie*, 46 Id. 501 (9 N. W. Rep. 828); *Ecliff v. Railway Co.*, 64 Id. 196 (31 N. W. Rep. 180); *Coops v. Railway Co.*, 66 Id. 448 (33 N. W. Rep. 541).

Ordinary care has relation to the situation and condition of the parties, and varies according to the exigencies which

Digitized by Google

require vigilance and attention, and, when contributory negligence is sought to be attributed to a child, the child can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment. *McGovern v. Railroad Co.*, 67 N. Y. 417; *Powers v. Harlow*, 53 Mich. 515 (19 N. W. Rep. 257).

When the testimony in the case was closed, counsel for the defendant asked the court to charge:

"1. Under the pleadings and proofs in this case, the plaintiff has failed to make a case. The verdict must therefore be for defendant."

"3. the plaintiff has failed to show that he was free from negligence which contributed to the accident. The verdict therefore must be for defendant.

"4. There is no evidence in the case tending to show that plaintiff was not careless or negligent in attempting to cross ahead of an approaching train, which was in plain sight. The verdict must therefore be for the defendant.

"5. There is no evidence in the case which would warrant the jury in finding that plaintiff did not know the danger of crossing the track ahead of an approaching train.

"6. Under the evidence in the case, the jury must find that the plaintiff was of sufficient age and intelligence to understand the danger of attempting to cross the track ahead of an approaching train; and that, so understanding, he made the attempt, either thoughtlessly or carelessly, without seeing the train, or because he thought he could get over before the train reached him. These facts preclude a recovery, and your verdict must be for the defendant."

"8. It is undisputed, and you must find as a fact, that the train which run over the plaintiff could be seen from any point east of the depot platform, and the place where the accident occurred, 400 feet from the place of the collision, and all the way from Twelfth street, and was in plain sight the whole of that distance; that the plaintiff knew that to be in the way of a moving train was dangerous; that he knew he was about to cross the railroad and that it was a place of danger. It was therefore his duty, before going upon the track, to look and listen, to ascertain whether or not a train was approaching, and, if he did not, such omission was negligence, and precludes a recovery; and if he did look, and

Digitized by Google

saw the train coming, and undertook to cross ahead of it, and was injured, such conduct was negligence, and prevents a recovery by plaintiff."

These six requests present all the exceptions in the case. It will be noticed that, if the first request should have been granted, no others need be considered. This request requires an examination of all the testimony in the case which is undisputed. In addition to what has been hereinbefore stated, it thus appears that the plaintiff did not know that there was any train due at that time, and heard none of the signals, and was in no manner aware of the approach of the train; that he was used to being about the cars, and playing about them, and near the track, and, without the knowledge of the conductors, had occasionally caught on the cars and rode to the depot in the city; and we must also have regard, to some extent, to the facts found by the jury in the case, viz.:

"That the train could be seen at a distance of more than 400 feet before reaching the place where the accident occurred; that plaintiff was an ordinarily bright, active, intelligent boy; that he knew it was dangerous to attempt to cross in front of an approaching train; that he did not see the train, but could and would have seen it before going upon the track if he had looked in the direction from which it was coming."

When we have considered them all, I do not think the case was one wherein the court should have directed the verdict. It was still left for the jury to say, under proper instructions from the court, whether or not the evidence satisfied them that this lad had such judgment and such comprehension as enabled him to appreciate the danger, and subject him to the consequences of negligence if he failed to use his reason and senses in efforts to avoid it. This question, I think, clearly remained for the jury to pass upon, and they have done so.

There was no error in refusing the first request, and this

Digitized by Google

ruling disposes of the defendant's third request in the same way.

The jury had the plaintiff before them. He was sworn in the case, and subjected to a long examination, both on direct and cross. This furnished the jury with additional evidence of his capacity, his intelligence, reason, and judgment. His carelessness depended entirely upon his ability to use these; and I think the defendant's fourth request went too far when it asked the jury to find that there was no evidence before the jury tending to show plaintiff was not guilty of negligence. They certainly had their own observation to aid them upon this subject. There was no error in the refusal of this request.

The defendant's eighth request has this fault: It makes the court judge of the capacity and ability of the plaintiff, and the manner in which he used the same on the occasion when the injury occurred, and whether he was of sufficient age and judgment to have used them otherwise, so as to have avoided the calamity which overtook him. This, under all the circumstances was the province of the jury, and there was no error in allowing them to pass upon the question.

Upon the points raised by the defendant's counsel upon this record, we have examined with care the charge of the court, and have been impressed with its clearness and fairness, and, however much we might have felt inclined to differ with the jury as to the verdict rendered, we fail to discover any action on the part of the court which could have possibly misled them.

Finding no error in the record, the judgment will be affirmed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 98
91 250
68 98
95 276
68 98
112 472
68 98
119 176
68 98
s35NW 840
129 *554

JOHN A. MONTAGUE v. GEORGE W. DOUGAN.

Findings of fact—Evidence—Account books.

1. The findings of fact made by the trial judge cannot be disturbed if there was any evidence to support them.
2. Since the statute has made the parties to a suit competent witnesses, they can testify as well to the keeping of their accounts, and the correctness of their books, as to any other facts, and proof by third parties of their having settled according to such books, and that they were correctly kept, is not essential to their introduction in evidence.
3. In a suit to recover the price of merchandise claimed to have been sold to defendant, to whom the credit was given, and by his order delivered to a third party, whom he claimed was the real debtor, the plaintiff's books are competent evidence to show to whom the goods were charged, and the credit given. *Larson v. Jensen*, 53 Mich. 427.

Error to Berrien. (Smith, J.) Argued November 10, 1887. Decided January 5, 1888.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Theo. G. Beaver, for appellant.

George F. Edwards, for plaintiff.

SHERWOOD, C. J. This case is an action of assumpsit, originally brought before a justice of the peace in the city of Niles. The plaintiff declared upon the common counts, adding thereto a bill of particulars of his demand. The defendant pleaded the general issue, with notice of set-off and of money tendered, and deposited with the court the amount tendered, being $16.32, and costs, $1.75.

The plaintiff recovered judgment before the justice for $93.73, and, on appeal by the defendant to the circuit court

Digitized by Google

for the county of Berrien, the plaintiff recovered $101.78. It was tried in the circuit, before Judge Smith, without a jury, and, at the close of the testimony, the defendant's counsel presented to the court 21 written requests to find upon the facts, and 9 upon the questions of law, which he deemed applicable to the facts in the case.

The following is the defendant's sixteenth request to find upon the facts:

"That this suit was commenced in justice's court; that on October 18, 1884, such justice taxed all the costs that had been made up to that time in said suit at $1.75; that on the same day defendant, by his attorney, tendered to George F. Edwards, who was the attorney for the plaintiff, the sum of $1.75, the costs made and taxed, and also the sum of $16.32, as sufficient to pay plaintiff's demand; that said attorney refused the same; that on the same day defendant filed his plea and notice of tender with said justice, and deposited the sum of $1.75, as costs, so taxed, and the sum of $16.32, as sufficient to pay plaintiff's demand, with said justice, who returned the same to the circuit court on the appeal herein; that said sums are still with the clerk of this court as such tender in said cause."

Upon the several requests, both of law and fact, the circuit judge made the following findings, upon which judgment was rendered:

"As to the 1st and 15th requests to find, I find that they are immaterial to the issue in this cause.

"As to the 2d, 3d, 4th, 3½, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, and 17th requests to find, they are incorrect and untrue.

"As to the 16th request to find, I find as requested.

"As to the 18th, 19th, and 20th requests to find, I find that they are statements of the defendant as to what he claims to be the evidence, and not of facts in the case.

"And to all his requests to find conclusions of law, I find them all not applicable to this case.

"I find, as matters of fact in this case, that the defendant purchased of the plaintiff, in the year 1879, goods, wares, and merchandise, and delivered by his order to one Jacob K. Brown, amounting to the sum of $73.29, as set forth in a

Digitized by Google

bill of particulars filed by plaintiff in this cause, and that, as a conclusion of law, the plaintiff is entitled to recover the amount, with interest from the eighth day of August, 1880, amounting to $101.78."

We have looked through this record, which purports to give all the evidence in the case, and think that the circuit judge came to the right conclusions in the case. We cannot disturb his findings of the facts, if there was any evidence to support them; and, as to the credibility of the testimony, his advantages for arriving at correct conclusions were far superior to ours. *Edwards v. Nelson*, 51 Mich. 121 (16 N. W. Rep. 261). Of course the tender, being insufficient in amount, was of no avail. The plaintiff and two witnesses testified to the obtaining of the goods sued for of the plaintiff, and that the defendant directed the goods to be charged to himself. We do not think any of the defendant's exceptions can be sustained to the rulings of the court in receiving and rejecting testimony.

Some stress is laid upon the fact that the plaintiff's books were allowed to be put in evidence, without proof by other persons that they had settled accounts with the plaintiff upon his books, and that he kept correct books. Such proof is unnecessary, since the statute allows parties to testify, generally, in the case. They can testify as well to the keeping of their accounts, and the correctness of their books, as to any other facts. *Brown v. Weightman*, 62 Mich. 557 (29 N. W. Rep. 98).

The question of the agency of a Mr. Brown, who purchased, and gave directions for the charging of, a number of articles, was strongly challenged upon the trial; but, so long as there were facts upon the subject of ratification of his agency to be found by the court, it is of little account what was the extent of his original authority. *Webster v. Wray*, 17 Neb. 579 (24 N. W. Rep. 207, 208).

The plaintiff's books were offered to show to whom the

Digitized by Google

goods were charged, and to whom the credit was given; and for this purpose, under the facts stated in the record, the proof was properly received. *Winslow v. Dakota Lumber Co.*, 20 N. W. Rep. 145; *Larson v. Jensen*, 53 Mich. 427 (19 N. W. Rep. 130).

The record fails to disclose any error prejudicial to the defendant, and the judgment at the circuit must be affirmed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

THE PLANO MANUFACTURING COMPANY v. PETER ELLIS.

68 101
70 580

68 101
78 77

68 101
124 292

68 101
125 256

68 101
127 657

68 101
s35NW 841
131 4 60

68 101
158 3254

Contract — Construction—Sale—Agreement that binder will "do good work and give satisfaction."

1. A cardinal axiom in the construction of a written contract is that all of its parts must be examined, and effect given to every word and phrase, if practicable.
2. The language used, if unambiguous, must be held to express the intention of the parties.
3. It is only where the language employed is not free from doubt or uncertainty that resort may be had to the condition of the parties, the subject-matter of the contract, and the circumstances surrounding the transaction and connected therewith, to aid the court in arriving at the intention.
4. The written contract relied upon in this case reads as follows:

"We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at the same price that Mr. Rheam has his for, and the binder is to do good work and give satisfaction; and, if not, the said Ellis is to pay for use of same."

Held, that the agreement that the binder was to do good work and give satisfaction embraced independent conditions, and unless the binder gave satisfaction to Mr. Ellis, as well as doing good work, he was not obliged to keep and pay for the machine.

Held, further, that a proper construction of the contract clearly

Digitized by Google

brings it within the first class of such contracts referred to in the case of *Wood Reaping, etc., Co. v. Smith*, 50 Mich. 565, 569, and is governed by the decision in that case.[1]

Error to Berrien. (Smith, J.) Argued November 10, 1887. Decided January 5, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Theo. G. Beaver, for appellant.

Geo. F. Edwards, for plaintiff.

CHAMPLIN, J. On the eighth day of July, 1885, the plaintiff, through its agents, Harder & Haynes, entered into an agreement with defendant in writing, as follows:

"NILES, MICHIGAN, July 8, 1885.

"We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Rheam has his for, and the binder is to do good work and give satisfaction; and, if not, the said Ellis is to pay for use of same.

"HARDER & HAYNES.
"PETER ELLIS."

Plaintiff, by its agents, delivered a Plano binder at defendant's farm, and set it up, and put it in operation. Defendant used it in cutting about 95 acres of grain, and claims that it did not do good work, and did not give to him satisfaction; and, on July 27, 1885, he served written notice on Harder & Haynes, as follows:

"NILES, MICH., July 27, 1885.

"MESSRS. HARDER & HAYNES.—

"*Gentlemen:* The sample Plano binder that you let me have on trial does not do good work, and does not give satisfaction. I am not satisfied with it. It is at my place, where you left it, subject to your order; you can come and take it. I am willing to pay for the use of the same, and hereby offer so to do.

"Yours, etc., PETER ELLIS."

[1] Head-notes prepared by CHAMPLIN, J.

Digitized by Google

On the trial, testimony was offered to show how the machine worked. The defendant's counsel objected to its introduction, as being immaterial. The circuit judge overruled the objection, and admitted the testimony, saying:

"My opinion of the construction of this contract is this: That it is to be a satisfactory machine, not to him, but such as people knowing the quality of machines would be satisfied with; it is to do satisfactory work."

Under this ruling a large amount of testimony was received as to the working of the machine while in defendant's possession, and the circuit judge, construing the instrument in his charge to the jury, instructed them as follows:

"As I said in the outset, this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to intelligent, reasonable men using machinery."

"The question for you to determine is, was this machine capable, with proper management, of doing as good work as those that are called good, first-class machines, working through the country, under the same circumstances, and in the same kind of grain? Was it a good machine, and did it do good work under proper management and proper conditions; did it do that kind of work so it should have been satisfactory to a man of intelligence in relation to this kind of machines; did it do that? That is the question."

We are of opinion that the circuit court erred in the construction which he placed upon the contract. A cardinal axiom in the construction of a written contract is that all its parts must be examined, and effect given to every word and phrase, if practicable. *Vary v. Shea*, 36 Mich. 388; *Norris v. Showerman*, Walk. Ch. 206; 2 Doug. 16; *Paddack v. Pardee*, 1 Mich. 421; *Howell v. Richards*, 11 East, 643.

The object is to arrive at the intention of the parties; and this is to be deduced from the language employed by them to express their intention. If the language employed is not free from doubt or uncertainty, resort may be had to the condition of the respective parties, the subject-matter of the

Digitized by Google

contract, and the circumstances surrounding the transaction and connected with it, and everything except the contemporaneous and previous declarations of the parties, for the purpose of enabling the court to ascertain the intention of the parties. *Mills v. Spencer*, 3 Mich. 127, 136.

Applying the above principles of construction to the writing introduced as the basis of the plaintiff's claim, it is clear that the binder was not only to do good work, but it was to give satisfaction to defendant. Unless he was satisfied with the machine, although it did good work, he was not bound to purchase. The construction placed on the instrument by the circuit judge completely nullified the words "and give satisfaction." He construed them as synonymous with "to do satisfactory work, such as people knowing the quality of machines would be satisfied with;" or, to use his own language, "this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to intelligent, reasonable men using machinery."

This, certainly, is not the usual signification of the word, and there is nothing in the context or in the subject-matter which indicates that the word was used in any other than its ordinary meaning. The vendor had already agreed that the binder should "do good work," and, if the learned judge had defined that phrase in the same way he did the word "satisfaction," it would have been applicable and proper.

No one can read this writing, and give to the words their ordinary meaning, without understanding that something more was required than that the binder should do good work before defendant was obliged to keep and pay for the machine. He was not obliged to do so unless it also gave satisfaction to him. We may not take judicial notice of the fact, but we may well suppose, that there is a choice between machines for reaping and binding that do good work. It may be that a machine which will do good, satisfactory work in reaping

Digitized by Google

and binding may, at the same time, have more side-draught than another, or it may be so geared as to require much more power to propel it than another, or its machinery may be complicated, and so constructed as to easily get out of repair, or require great care and skill in operating it. All these things may not be impossible, or even improbable. How, then, can it be said that, although it does good work, nevertheless it may not fail to give satisfaction? Or why should it be said, when the bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased if another reasonable or intelligent man is pleased with the work of such machine?

There is another clause in the contract which has a bearing upon the question. It is stipulated that if the machine does not do good work, and give satisfaction, the said Ellis is to pay for the use of the same. It cannot be contended, with reason, that Ellis agreed to pay for the use of a machine that did not do good work. This clause implies that it may do good work, and yet not give satisfaction so that he would be willing to keep and pay for it. He agreed that if it did not do good work, and give satisfaction, he would pay for the use of the binder. He was entitled, under the agreement, to give the machine a thorough, practical trial; and then, if he was not satisfied with it, he was to pay for the use of it. This provision entitles the writing to a liberal construction in his favor. It shows that he had an option to accept or reject the binder, according as it gave him satisfaction or not.

A proper construction of the contract clearly brings it within the first class of such contracts referred to in *Wood Reaping, etc., Co. v. Smith*, 50 Mich. 565, 569 (15 N. W. Rep. 906), and is governed by the decision in that case.

The judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., and MORSE, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 106
92 619

DAVID MITCHELL v. DANIEL W. MITCHELL ET AL.

Equity—Partition of estate by heirs at law—Acquiescence.

After an acquiescence in the division and partition by the heirs of an estate for twenty years, it is too late for one of them to disturb or impeach it.

Appeal from Oakland. (Stickney, J.) Argued November 11, 1887. Decided January 5, 1888.

Bill filed for partition of real estate, to dissolve a partnership, and for an accounting. Defendant Daniel W. Mitchell appeals. Decree affirmed, and record remanded for further proceedings thereunder. The facts are stated in the opinion.

Aaron Perry (*Aug. C. Baldwin*, of counsel), for complainant.

Charles F. Collier (*F. A. Baker*, of counsel), for defendant.

MORSE, J. George Mitchell, the father of David and Daniel W., the main parties in this litigation, died in the township of Holly, Oakland county, July 10, 1852, leaving a widow, Eleanor S. Mitchell, and seven children, named, respectively, William, John C., David, Daniel W., Hannah, Sarah, and Margaret.

At the time of his father's death, the defendant Daniel W. was 10 years of age.

George Mitchell left no will, and at his decease was the owner of 300 acres of land, constituting a farm, upon which he resided, in said township of Holly. He also had a few hundred dollars of personal property. He held a lease, having about three years to run, upon 120 acres of land, adjoining

Digitized by Google

his premises, known as the "Caton Farm." His estate was never administered upon in the probate court.

After his death, the widow and children remained upon the farm; the widow and the older boys taking charge of the same, and the personal property.

William was the eldest of the children. In 1855, he sold out his interest in the farm to John C. and David; the deed, however, running to John C. alone. From that date until 1863, John C. and David ran the farm together in copartnership. In 1857, they purchased the Caton farm, and it was deeded to them jointly. When Daniel W. came of age, in 1863, John retired, in accordance with an arrangement made between the three brothers. John received 60 acres of the home farm, and quitclaimed his interest, which consisted of his share and William's, to the other children. The deed contained a clause that it was understood by all the parties to the same that David was to have 21½ acres of the land over and above his equal and undivided share in the same, because of his interest in William's share. David and Daniel W. then began to work the place in copartnership, and continued to do so up to about the time of the filing of the bill of complaint in this cause.

At the time of this arrangement between John, David, and Daniel W., the elder boys divided the Caton farm between them; John taking seventy acres, and David fifty.

In 1867, David and Daniel W. purchased the sixty acres of the home farm of John; David deeding, in part payment of the same, forty acres of the Caton farm.

In September, 1868, a partition was amicably made of the home farm between David and Daniel W., of the one part, and the three girls, Sarah, Hannah, and Margaret, upon the other. By this partition the girls received in severalty certain portions of the premises, amounting to 140 acres in all; leaving in the possession of David and Daniel W. the sixty acres they had bought of John, and 100 acres besides. Quit-

Digitized by Google

claim deeds were executed and delivered between the parties to carry out this agreement.

In the deed of the girls, conveying their interest in the 100 acres to David and Daniel W., it was expressly stated that three-fifths was to be the property of David, and Daniel W. was to have two-fifths of the premises. Subsequently, the boys bought out the girls, and when this bill was filed they owned together the old farm as their father left it.

Differences arose between David and Daniel W. in 1884, and the complainant filed his bill for a partition of the lands, a dissolution of the copartnership, and an accounting. The defendant Anna Mitchell is the wife of Daniel W., and Mary A. is the wife of David. They are made parties defendant because of their dower-rights in the premises.

There is no dispute as to the division of 200 acres of the old farm. It is conceded that each of the boys has an equal one-half interest in the same. David claims three-fifths of the 100 acres, while Daniel insists that it should be divided equally. Ten acres of the Caton farm, the legal title of which stands in David, is also in dispute. Daniel claims half of it, while David denies that he has any interest in it.

The court below found in favor of David on both claims, and a partition of the land has taken place on that basis, and the case referred for an accounting.

The defendant Daniel W. appeals. He finds no fault with the partition as it has been made, in case his claim is not sustained here. He asks this Court to decree him a half interest in the 100 acres of the home farm, and also in the Caton 10 acres. The widow of George Mitchell lived on the place with the children and helped manage the farm and property until she died, in 1862. There was $500 or $600 of personal property at the father's death. He was owing about $100.

It is claimed by the defendant's counsel that the Caton farm was purchased almost wholly from the proceeds of the

Digitized by Google

home farm; that William's interest was purchased in the same way; that John C. and David occupied a fiduciary and confidential relation towards the defendant and the other children, especially those who were under age; that, when they took charge of the estate and managed it, the profits of the property inured to the benefit of all; and although they took the legal title of the Caton farm in their own names, and also William's interest in the home farm, they must hold the same in trust for all the children.

We listened with pleasure and profit to a most able and interesting argument from defendant's counsel upon the duties of these older children, under the circumstances, to the younger, and as to the latter's rights to their full share of the proceeds of this farm of their father's; but we do not consider it necessary, in adjusting the equities between these two brothers, to investigate or discuss what might be, under other circumstances or in other cases, the duties or rights of older and younger children in a case like the present.

Here, all the parties have been satisfied with the arrangements made between all the children for 17 years, since the last division in 1868, and the defendant has acquiesced in the deeds of William and John since 1863, when he became of age. When he was 21 years old, and presumably a man of ordinary intelligence,—at least, the law presumes that he was capable of transacting business for himself,—he, in common with David, took possession of William's and John's shares under a deed that gave, in effect, David three-fifths to his two-fifths of such interest. And in 1868, when the partition with the girls was made, he accepted a deed from them conveying their interest in the 100 acres in the same proportion as between him and David. He knew, also, from the beginning, that he had no part in the legal title to the Caton farm, and he made no claim for any share therein until he and David disagreed about their partnership matters.

His claim as to the 100 acres is that he was not aware of

Digitized by Google

the clause in the deeds giving David three-fifths of the same. We think his claim cannot be sustained from the evidence. We are satisfied that he knew all about it, and concurred with the rest of the children in the arrangement. When he became of age he admits that he received one-third of the personal property then on the place, which amounted, according to the testimony, to about $500. This, David claims, was given him for his work upon the farm while a minor. It would appear from the evidence that Daniel W. received more benefit from the working of his father's place by his older brothers than he would had the farm and property been divided at once upon George Mitchell's death. Between such death and the majority of the defendant, houses and barns were built upon the place, an orchard set out, and forty acres or more cleared and converted into plow land. Of these improvements all the children in the partition of 1868 received their full share in the division of the farm.

But, be this as it may, the defendant must be considered to have been fully acquainted with the arrangement by which David became entitled to three-fifths as against his two-fifths of the 100 acres, and also possessed of the whole title to the ten acres of the Caton farm. In this arrangement and division he has acquiesced for over twenty years. It is too late now for him to disturb or impeach it.

The decree of the court below was right, under the proofs, and must be affirmed, with costs.

The record will be remanded to the circuit court, in chancery, for the county of Oakland, for further proceedings under its decree.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

Digitized by Google

THE PONTIAC, OXFORD & PORT AUSTIN RAILROAD COMPANY v. ROBERT H. KING.

68 111
116 678

Railroad aid note—Performance of conditions.

The maker of a note given in aid of the construction of a railroad, the payment of which is conditioned upon the running of cars on the road by a certain date, becomes liable for such payment if the railroad company begins to run construction trains over the road by the date named, although the road is not ballasted nor in fit condition for use, and freight and passenger trains are not run thereon, until some months after said date.

Error to Tuscola. (Beach, J.) Argued November 11, 1887. Decided January 5, 1888.

Assumpsit on railroad aid note. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Aug. C. Baldwin, for appellant.

Black & Corcoran (*Black, Moran, Wilkins & Gray*, of counsel), for defendant.

SHERWOOD, C. J. The plaintiff declares in assumpsit upon a note of which the following is a copy:

"$150.00. NEWBERRY, October 8, 1881.

"For value received, and to aid the Pontiac, Oxford & Port Austin Railroad Co. to construct its road, I hereby promise and agree to pay to the order of the said company the sum of one hundred and fifty dollars, within ten days after the cars shall run upon said road to within one-third of a mile of Newberry: *Provided* the same is done within 18 months from date; otherwise to be null and void.

"ROBERT H. KING."

The common counts are also added. Plea, general issue.

This cause was tried in the Tuscola circuit by jury before Judge Beach. On the trial the plaintiff, besides offering the

Digitized by Google

note in evidence, gave testimony tending to show that, in the fall and winter of 1881 and 1882, the company proceeded to construct its road, beginning at Caseville, the northern terminus, and working south towards Newberry (now Kingston), until the road was graded, tied, and ironed through Kingston to Clifford, several miles south, and about 46 miles south of Caseville. The track ran and was laid within 50 rods of the principal business street in Kingston on the first day of April, 1883, and was continued south, and completed to Pontiac in the month of July thereafter.

The testimony further tended to show that construction trains began to run daily, passing and repassing over the road through Kingston, before April 5, 1883, but the road was not ballasted nor completed through Kingston until after the fifteenth of April.

Plaintiff also gave evidence of the incorporation of the company, and it was also conceded that the road was not in fit condition for use, and freight and passenger trains did not begin to run until October 1, 1883. By the amended articles of incorporation, it appeared that the northern termination of the road had been changed from Port Austin to Caseville, in the county of Huron.

The defendant gave testimony tending to show that during the summer of 1883, and until October 1, the defendant was a merchant, and had to haul his freight into Kingston, by wagon.

The foregoing is the substance of all the testimony given upon the points raised in the case.

Counsel for the plaintiff asked the court to charge the jury:

"1. By the terms of the note in this case, if the cars on plaintiff's road were running within the time prescribed, April 11, 1883, to within one-third of a mile of Newberry, the plaintiff would be entitled to recover.

"2. That it was not necessary that the plaintiff's road should be completed its entire length, or,—

Digitized by Google

"3. That cars should be running its entire length.

"4. If the railroad track was laid from one of its *termini* within the time, and within the distance of Newberry, and construction trains were passing over it from Caseville, the northern terminus, to Newberry, and beyond that place southerly, within 18 months from October 8, 1881, then the plaintiff would be entitled to recover the amount due upon the note, and interest, even if the road was not ballasted and completed."

These requests were all refused, and the refusals severally excepted to, and the circuit judge thereupon charged the jury as follows:

"On the part of the plaintiff it is admitted that the road was not in such condition eighteen months from date that regular traffic had taken place upon it, or could be done upon the road.

"The plaintiff insists, as a matter of law, that the simple running of construction trains over the road was a compliance with the contract.

"And it also says that the question is purely a question of law as to whether it was a compliance with the contract or not. There were no passenger or freight cars run upon the road, and the road was not open for general traffic.

"I charge you, as a matter of law, as the construction of this contract is for the court, that a reasonable and fair construction of this contract is that eighteen months from the date of the note the road was to be in such a condition that it was open for passenger and freight traffic, and it is admitted by the plaintiff that it was not in such a condition; consequently I charge you to render a verdict of no cause of action, without leaving your seats."

The verdict was taken, and judgment entered thereon, as directed by the court.

The exceptions to the refusal of the court to give the plaintiff's requests to charge, and the direction given in the charge, are relied upon here for a reversal.

We think the circuit court erred in his rulings, and in the construction he gave to the contract between the parties. The promise of the plaintiff was not to build and perfect its road-bed and track, or its rolling stock and equipments,

Digitized by Google

within the 18 months, to the point named, but to construct within that time its road-bed and track, and so far perfect the same that cars could be run over the road, and actually make such run within the time stated. This it did, and the subsequent completion of the road is evidence undisputed of the good faith with which it was done. If anything more was contemplated or required by the defendant when he gave his note, he failed to have it stated in his contract with the plaintiff.

It is a matter of common knowledge that much usually remains to be done in completing a railroad track, and in making it safe for regular freight and passenger business, long after the cars have commenced running upon it. It was to aid in its construction that this note was in part given. The road was a continuous one, and to secure its construction to Kingston within a certain time was the principal object the defendant had in view at the time he gave the note. Once there, he knew it would not remain long unfit for use. With a track so far completed as to admit of cars passing over for a distance of 40 miles, no company would fail to use it in its regular business at the earliest possible moment.

We think the company, after receiving this note, in its subsequent action, did all that either party could have reasonably expected or intended at the time it was made, and we should not, in giving construction to the contract, add any new conditions to be performed by either party; and this it seems quite clear we should do were we to adopt the construction asked for by the defendant's counsel. The requests of counsel for the plaintiff should have been given, and the cause submitted to the jury. *Swartwout v. Mich. Air Line R. R. Co.*, 24 Mich. 389; *Mich., Midland, etc., R. R. Co. v. Bacon*, 33 Id. 466; *Tower v. Detroit, L. & L. M. R. R. Co.*, 34 Id. 328; *Stowell v. Stowell*, 45 Id. 364 (8 N. W. Rep. 70).

Digitized by Google

The judgment must be reversed, and a new trial granted.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

GEORGE W. FRENCH v. NORTON FITCH.

[See 67 Mich. 492.]

Appeal—Bill of exceptions—Costs.

Where the court refused to order the stenographer of the Kent circuit to file a copy of the testimony in a case pursuant to How. Stat. § 6515, and the counsel for the appellant procured the necessary portions to settle a bill of exceptions, which were also used by the opposing counsel in preparing amendments, and before the circuit judge on such settlement, who certified to the necessity of such use, the expense of procuring such testimony is properly taxable as a part of the appellant's disbursements.

Motion for retaxation of costs. Argued January 4, 1888. Denied on hearing, and opinion filed January 5, 1888. The facts are stated in the opinion.

Birney Hoyt, for motion.

H. B. Fallass, contra.

PER CURIAM. The item of costs in dispute is a claim of $62 for copy of stenographer's minutes used in settling bill of exceptions. The facts as to the use of this copy are similar to those in *Maynard v. Vinton*, 59 Mich. 155 (27 N. W. Rep. 2), and that case must govern.

The defendant's counsel requested the circuit judge in the present case to make an order requiring the stenographer to file a copy of the testimony in the cause, but the court refused to do so. The counsel then procurred, at the expense

Digitized by Google

of $62, certain portions of the testimony, showing that the same was necessary to the settlement of the bill. This testimony was also used by the counsel for plaintiff in preparing amendments to the bill, and the circuit judge certifies that such testimony was used before him, and was necessary to the settlement of the bill of exceptions in the case. It only differs from *Maynard v. Vinton* in that there is no showing that the court refused to settle the bill without a copy of the testimony; but the certificate of the circuit judge shows the necessity of the expenditure for this testimony.

The item was correctly taxed by the clerk of this Court, and the motion for retaxation is denied.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY v. THE WAYNE COUNTY SAVINGS BANK AND ALICE H. CURTIS.

Contract of married woman—Life insurance—Assignment of policy—Fraud—Pleading.

1. The introduction in evidence of a promissory note signed by a married woman *jointly* with her husband, with proof of her signature, will not make a *prima facie* case against her. *Buck v. Haynes Estate*, 75 Mich. 397.
2. In order to bind a married woman, the contract must be one on behalf of her sole property, and it should appear to have been made with that intent, as well as upon a consideration that would sustain it for that purpose; the burden of proof being on the plaintiff to show for what purpose she contracted, and to prove it clearly. *West v. Laraway*, 28 Mich. 466.
3. Where an insurance company filed a bill of interpleader against a bank claiming as assignee of a policy under an assignment executed by the assured and his wife, and against the widow, who claimed under a prior assignment from her husband, and who denied the validity of the assignment to the bank, and the answer of the bank was silent as to the *fact* of such *prior* assignment, which was alleged in the bill, such assignment is sufficiently

Digitized by Google

proved by the testimony of the widow to its execution and delivery, with the policy, and to its subsequent loss and search therefor, and by the introduction of an alleged copy, sworn by her to be genuine.

4. Under How. Stat. §§ 4288, 6300, 6301, a wife may insure the life of her husband in her favor, with a provision that in case she died first the insurance shall be paid to their children, or to their guardian if under age.
5. The validity of an assignment of an insurance policy, issued by a foreign company, is to be determined by the laws of the state where made and attempted to be enforced.
6. On a review of the testimony, the Court find that the assignments of the insurance policies by George E. Curtis and wife were void as to her.

Appeal from Wayne. (Speed, J.) Argued October 12, 1887. Decided January 12, 1888.

Bill of interpleader. Defendant Alice H. Curtis appeals. Decree reversed, and one entered according to opinion. The facts are stated in the opinion.

Alexis C. Angell, for complainant.

Duffield & Duffield, for appellant.

Moore & Canfield, for defendant Wayne County Savings Bank.

SHERWOOD, C. J. Both defendants in this case claim the amount of moneys due upon two policies of insurance issued by the complainant upon the life of George E. Curtis, who was the husband of Alice H. Curtis, one of the defendants.

On November 28, 1864, the company issued the first policy, in the sum of $3,000, to Mrs. Curtis, by the terms of which it was made payable to her if she survived her husband, and, if not, then to be paid to their children, or to their guardian.

December 31, 1866, the company issued the second policy, in the sum of $5,000, to George E. Curtis, payable to the

Digitized by Google

assured, his executors, administrators, or assigns; and, the eighteenth day of May, 1876, he assigned this policy over to his wife.

Both of these policies, it is claimed by the complainant and the other defendant, were duly assigned by George E. Curtis and his wife to the defendant bank,—the $5,000 policy, on the twenty-third day of July, 1884, and the $3,000 policy, on the twenty-ninth day of the same month. These assignments, Mrs. Curtis claims, are void.

On the thirteenth day of August, 1884, it appears that George E. Curtis and his wife executed to the bank a promissory note for the sum of $7,936.20, payable on or before six months after date. This note recites that the said policies of insurance were deposited with the bank as security for the payment of said note. This note Mrs. Curtis also claims to be void as against her.

George E. Curtis died on the twenty-third day of September, 1885.

The bank, as assignee of the policies as above stated, on the third day of November, 1885, presented proofs of loss; and on the sixth day of January, 1886, Mrs. Curtis presented to the company the usual proofs in such cases, showing the death of her husband; and each party claims the right to receive the amount due on the policies, assured to the proper owner.

The insurance company makes no contest against the claim of the party legally entitled to the money, and, for the purpose of determining this question, it has caused to be filed the bill in this case in the circuit court for the county of Wayne, in chancery, and, under the order of the court, has deposited the amount due upon the policies with the register thereof, for the legal owner of the same. To the complainant's bill setting forth the above facts, and that complainant cannot ascertain to whom it can with safety make payment, and that the bank threatens to bring suit at law to compel

Digitized by Google

payment of the amount it claims under the policy, the defendants filed their several answers.

The answer of the bank sets forth the assignments of the policies, and avers, among other things, that, prior to their date, the bank had loaned George. E. Curtis and Alice H. Curtis large sums of money, to secure the payment of which the assignments of said policies were made; that, subsequent to the assignments, the bank also loaned certain other moneys upon the same security; and that on or about August 13, 1884, an accounting was had between the parties, and there was then found and agreed to be due to the bank the sum of $7,936.20, for which sum Curtis and wife executed the note before referred to.

That, subsequent to the giving of the note, the bank also loaned Curtis and wife on December 31, 1884, $390; on January 26, 1885, $190; on March 7, 1885, $190; and on September 26, 1885, $70,—making the entire indebtedness due to the bank, $8,776.20; that the consideration for the assignment of said insurance policies as aforesaid was money loaned by the defendant to the said George E. and Alice H. Curtis prior to and at the date of said assignment, and that the same was intended as security to the defendant for the money so loaned as aforesaid, and for any other moneys which the said defendant might thereafter loan to the said George E. Curtis and Alice H. Curtis, or either of them; and that there is now due and unpaid to this bank, for moneys by it loaned as aforesaid, the sum of $8,776.20, besides interest, as security for which this bank holds the aforesaid policies of insurance.

The defendant bank further says that—

"This defendant has no knowledge that the said Alice H. Curtis claims that the said assignments to this defendant are void as against her, or that she is entitled to said money, and leaves complainant to its proofs in regard to said allegation. But it shows that any such claim on the part of said Alice H. Curtis is without any just foundation; that, the said

Digitized by Google

insurance policies being due and payable to this defendant, this defendant insists that it has a right to collect the same, and, if necessary, to bring suit therefor against the said complainant; and this defendant, upon information and belief, denies that the said complainant cannot safely pay over said moneys, due as aforesaid, to this defendant, or that it is in any danger of being harassed if it should make such payment."

Mrs. Curtis, in her answer, admits the procuring of the policies as stated in the bill, and the assignment of the $5,000 policy by her husband to her. She avers that she—

"Has never sold or transferred the same, for value to her accruing, or knowingly parted with or assigned the legal title to the same, to any other person or party, but claims to be the sole, true, and lawful owner thereof, and of all moneys due and payable thereon."

She admits the claim of complainant on the first of said policies for the amount due on the premium note, and is ready and willing to allow the same on payment to her of the balance admitted to be due thereon.

She denies that she ever made or entered into any contract or agreement with said bank on the thirteenth of August, 1884, or at any other time, or since, by which she became indebted to or chargeable with any liability to pay money to said bank or its assigns; and that she never received any money or valuable consideration from said bank in connection with any such alleged contract or contracts; and that she was never holden in any way, or individually liable to any extent, to said bank.

She further says that she never intended to assign her interest in said policy to the bank, for any purpose or in any manner, and if such an assignment in fact exists bearing her signature, which she does not admit, it was obtained wrongfully and fraudulently, and without any knowledge on her part that the same was attached to any instrument of assignment, or any knowledge on her part that said bank ever claimed that she was indebted to the bank, and it was there-

Digitized by Google

fore inoperative and void; and that the same is true with regard to the $3,000 policy; that she never had any treaty with the bank or its agents by herself or otherwise by which she assigned said policies, or either of them, to the bank, as security, or in any other manner; that by the death of her said husband the last-named policy became hers absolutely, and she is the sole owner of the same, and entitled to the amount due thereon from the complainant.

She, further answering, says she never, by herself or agent, borrowed or received any sum of money from the bank, and that she never gave her note to said bank; that, if said bank made loans as stated, they were to her husband alone, and on his credit; and that, if he assumed to use her name and signature to the notes and assignments mentioned in the answer made by the bank, it was done without her knowledge or consent, and that she never received anything for or on account of said alleged loans; and, that if her signature was obtained to any paper held by said bank by her said husband, it was done by misrepresentation and deception, and not with her assent, knowledge, or understanding of the same.

The answer further proceeds as follows:

"And this defendant submits and avers that said George E. Curtis, as she has since his death been advised and believes, was in the habit of indulging in various speculations in grains, stocks, and other articles on his own account, and without any knowledge or participation therein on the part of this defendant, but with full knowledge on the part of said Wayne County Savings Bank, or one or more of its officers, who furnished him the means for such operations; and, when said George E. Curtis was unsuccessful, he resorted to certain misrepresentations and deceptions to and upon this defendant to procure the signatures (if such in fact were obtained) of this defendant, in order to carry out those individual operations and schemes of his own; and that said bank consented and co-operated with him in this endeavor, well knowing that this defendant was in nowise interested in or had knowledge of his said operations.

"And this defendant, further answering, says that the means

Digitized by Google

thus used in procuring her signature to said papers, if such were obtained, were wholly fraudulent and void; and that the notes held by said bank bearing defendant's signature, if any such there are, were all the individual debts of said George E. Curtis, and not of this defendant, who was neither personally, nor in her estate, benefited or advantaged thereby; and she is therefore in nowise chargeable therewith or holden thereon, and she asks this court so to decree.

"And this defendant, further answering, says that at no time during the life of said Curtis was she ever advised, either by him or by said bank, that any moneys had been furnished by said bank, either to said George E. Curtis or any one else, on her name, credit, or securities; and she expressly avers that none such were ever furnished to her.

"And she also avers and declares that not long before the death of said George E. Curtis, and subsequent to the date of said alleged assignment, he expressly informed her, in the presence of third parties, that said policies of insurance were still maintained for her benefit, and would be sufficient, in case of his death, to take care of herself and her children, and she never knew anything to the contrary until after his death, when claim was made by said bank against this defendant on said policies."

The defendant asks that a decree may be entered in her favor, declaring said notes and assignments, if any are held by the bank as claimed, void against her, and that the bank be required to surrender up to her the two policies of insurance, and that complainant be decreed to pay to her the amount equitably due to her thereon.

Considerable testimony was taken in the case, which was heard before Judge Speed, in the Wayne circuit, and who entered a decree that the register of the court pay to the bank the money deposited, and that said bank recover its costs in this suit against the defendant Alice H. Curtis. From this decree Mrs. Curtis appeals to this Court.

After a careful examination of the record, and review of briefs of counsel for the respective parties, I have been unable to arrive at the conclusion reached by the learned circuit judge in this case. The undisputed testimony in the case

Digitized by Google

shows that Mrs. Curtis, at the time of her marriage, had no property or estate of her own, and that she never before or after her marriage carried on any business herself, or in company with any other person or corporation, but devoted herself exclusively to the care and management of her own household and domestic duties; that she never gave her husband any written power of attorney to do business for her, and that previous to her husband's death she never did any business personally with the bank, or with any of its officers; that her husband, in his life-time, was a reticent man, and never gave his wife any information in regard to his business or his manner of doing it; and that she was extremely ignorant in regard to all business transactions, and of the ways and manner of doing business, and entirely uninstructed in regard to the form of contracts and effect of legal instruments; that her husband failed in business in Detroit in 1879, and that since that time Mrs. Curtis consented to the sale of their homestead, which was placed in her name, and which she held under a contract of purchase, her interest therein being only about $2,000, which her husband received; and this, and some compensation for assistance given to the assignee on a salary, and some moneys received on the sale of an interest in some heirship property in other states, and collections made upon sundry old claims bid in for him at an auction sale made of his bankrupt estate,—in all, amounting to a few thousand dollars,—were the only means for the support of his family. His business, after making his assignment, seems to have been little known to any one except the defendant bank, and its officers and clerks. It does, however, appear, that he had something to do in buying and selling stocks.

It further appears that he procured from the bank, in the shape of loans in various sums, money amounting to over $8,000, and in so doing used or procured his wife's signature with his own to paper upon which most of the loans were

Digitized by Google

made, and even obtained her signature to assignments of the two policies of insurance which she held upon the life of her husband, as collateral security for the payment of said notes running to the bank, which it held at the time of his death; and it is the money now due upon these policies for which the bank makes the contest in this suit. These facts, thus far, are all undisputed.

It also appears that Mr. Curtis was married to Mrs. Curtis on the thirteenth day of September, 1864, and that the dealings of her husband with the bank, out of which the claim made by it arose, commenced in 1880, and that the account which was kept by the bank was under the name of Alice H. Curtis, and consisted entirely of notes and discounts, and that all the transactions relating to the account were had between S. D. Elwood, who was secretary and treasurer of the bank, and G. E. Curtis.

Counsel for the bank argue that from the record the following facts appear:

"1. That, for a series of years before the policies were assigned to the bank, George E. Curtis had dealt with the bank in his wife's name; during which time the bank had loaned large sums of money upon notes executed by Mrs. Curtis. Some of these notes were paid; others renewed. At other times new loans were made, and new notes given.

"2. That at the date of the assignment of the policies there was actually due to the bank for money thus actually loaned and paid, and for interest thereon, $7,936.20, for which the bank then held some twenty notes, all of which were signed by Mrs. Curtis.

"3. That on or about August 13, 1884, a statement of account showing the amount of indebtedness was rendered to Mr. Curtis, and the note Exhibit 'A, signed by himself and by Mrs. Curtis, for the amount of indebtedness, was given to the bank, and the original notes were surrendered up by the bank; that this was done on a settlement.

"4. That the $800 paid to Hubbard & Farmer, with interest thereon, is included in Exhibit A.

"5. That Mr. Curtis had repeatedly promised to give

Digitized by Google

the bank security, and that, relying upon this promise, the debt had been permitted to accumulate.

"6. That the policies were assigned to the bank by Curtis and wife in compliance with his oft-repeated promises.

"7. That, subsequent to the assignment, the bank, relying upon the security, loaned other sums of money, which, with the note Exhibit A, exceed $8,000.

"8. That Mrs. Curtis knew of the existence of the indebtedness to the bank; that she executed the note Exhibit A, and the assignments of the policies; that the same were delivered to the bank, and have remained in its possession ever since, and that the bank thereby became the legal and equitable holder of the policy.

"9. That there is no evidence of any assignment of the $5,000 policy to Mrs. Curtis, or that she ever had any title to that policy.

"10. That the assignments executed by Mr. and Mrs. Curtis to the bank were in all respects legal."

Exhibit A, referred to, is as follows:

"DETROIT, MICH., August 13, 1884.

"On or about six months after date, we promise to pay the Wayne County Savings Bank, or order, seventy-nine hundred thirty-six and 20-100 dollars, for value received, with interest at the rate of (8) eight per cent. per annum, payable monthly; having deposited with said The Wayne County Savings Bank, as collateral security, with authority to sell the same at public or private sale, or otherwise, at its option, on the non-performance of this promise, and without notice, insurance policies covering $8,000.

"GEO. E. CURTIS.
"ALICE H. CURTIS."

It appears that Mr Curtis had, before the assignment of the policies to the bank, assigned the small policy to Hubbard & Farmer as security for the payment of $800, which the bank had to pay before it could get the policy into its possession.

Counsel for the bank claim that—

"By the production of the note and policies, and assignments thereof, with proof of the signatures thereto, the bank has made a case which *prima facie* entitles it to a decree for the money called for by these policies and paid

Digitized by Google

into court. Exhibit A, being a promissory note, is *prima facie* evidence of consideration; and the burden of proof is upon Mrs. Curtis to show a want of consideration, or some invalidity in the assignments of the policies."

That the defendant Alice H. Curtis was the lawful wife of George E. Curtis, when the note and assignments of policies under which the bank claims were made, is not questioned in the record; and it nowhere appears in the case that the transaction related to the wife's separate estate or property, or that the note and assignments were made for her, or on her account, or that they were intended for her benefit, or that she ever received any consideration or valuable thing whatever upon said note. Her husband received the money; it was negotiated for by him, and, when obtained, used by him.

The place in which the wife's name appears upon the note is quite as consistent with her character as surety as that of principal upon the paper. It is only upon the ground that she can be in some way made liable for the payment of the note that the bank can claim to be entitled to the avails of the collaterals transferred by her to secure its payment.

I do not think, under the authorities of this Court, that the introduction of the papers, with the proof of the signature, made out a *prima facie* case against the defendant Mrs. Curtis. Article 16, § 5, Const.; How. Stat. § 6295.

In *De Vries v. Conklin*, 22 Mich. 255, Mr. Justice COOLEY, in speaking for the Court, said:

"The statute neither in terms authorizes a married woman to make herself liable personally for the debt of another, nor, where no consideration moves to her, can it be presumptively for her benefit."

In that case the suit was brought to recover on a note made by a husband and wife, on a demand created without any reference to her ownership of property.

Mr. Justice CAMPBELL, in *West v. Laraway*, 28 Mich. 466, said, in speaking upon this subject:

Digitized by Google

"The contract, in order to bind her, must be a contract on behalf of her sole property. It should appear to have been made with that intent, as well as upon a consideration that would sustain it for that purpose. * * * As we have always held, the burden of proof is on the plaintiff to show for what purpose she contracted, and to prove it clearly."

And on pages 470 and 471, he said:

"Those who deal with her on her personal responsibility must be prepared to show that she acted within her legal powers."

Kenton Insurance Co. v. McClellan, 43 Mich. 564 (6 N. W. Rep. 88), was the case of a married woman who denied that the consideration of a note given by her was such as would bind her; and it is said in that case:

"It has been held uniformly by this Court that our statutes do not authorize a married woman to become personally liable on an executory promise, except concerning her separate estate. * * * It has also been settled that there is never any presumption of validity of such an undertaking, whether negotiable or not, and that proof must always be given of such a consideration as will bind her. We think that the rule must apply whether the value is expressed or not, because the power is not general, but statutory, and cannot be extended beyond the constitutional and statutory limits."

To the same effect are the following authorities: *Barnes v. Brown*, 32 Mich. 153; *Emery v. Lord*, 26 Id. 431; *Ross v. Walker*, 31 Id. 120; *Jenne v. Marble*, 37 Id. 319; *Kitchell v. Mudgett*, Id. 81; *Carley v. Fox*, 38 Id. 387; *Johnson v. Sutherland*, 39 Id. 579; *Russell v. Bank*, Id. 671; *Rickle v. Dow*, Id. 91; *Powers v. Russell*, 26 Id 179; *Gantz v. Toles*, 40 Id. 725; *Buhler v. Jennings*, 49 Id. 538 (14 N. W. Rep. 488); *Wilson v. Coolidge*, 42 Id. 112 (3 N. W. Rep. 285); *Richards v. Proper*, 44 Id. 96 (6 N. W. Rep. 115); *Harvey v. Galloway*, 48 Id. 531 (12 N. W. Rep. 689); *Edwards v. McEnhill*, 51 Id. 160 (16 N. W. Rep. 322); *Schlatterer v. Nickodemus*, 51 Mich. 626 (17 N. W. Rep. 210); *Reed v.*

Digitized by Google

Buys, 44 Id. 80 (6 N. W. Rep. 111); *Tompkins v. Hollister*, 60 Id. 479 (27 N. W. Rep. 651).

In regard to the testimony in the case confirming the ten propositions of fact, as claimed by counsel for the bank, above stated, I am unable to agree with them in that conclusion. If what Mrs. Curtis says is true, she never knew that her husband ever had any dealings in her name with the bank, or that she ever signed a note to the bank with her husband, or in any other manner; nor that she ever, with or without her husband, made an assignment of the policies of insurance to the bank; nor that she ever knew, previous to the death of Mr. Curtis, that he owed the bank anything; nor that the bank ever paid Hubbard & Farmer any money to redeem said policies for her; nor that Mr. Curtis ever promised to give to it any securities for moneys he owed, or to be thereafter obtained by him, at the bank, or that any was afterwards obtained on such securities, or that said policies were ever delivered to the bank; and, finally, that she knew nothing of her husband's dealings with the bank until informed by her brother-in-law, Mr. Penney, several days after the death of her husband, and while she was lying upon the bed, too sick to do any kind of business; and that when she was first informed he had been doing business in her name, and that her name appeared to the large note, and to the assignments of the policies of insurance, she was startled and astonished, and very emphatically denied that she had ever signed the notes or the assignments, and not until confronted with them could she be made to believe that the signatures were hers.

It further appears from her testimony that for several years Mr. Curtis had been in the habit of procuring his wife's signatures to blank notes without her knowing what the instruments were, and without any knowledge on her part for what purpose they were to be used, if at all, by him, and that in this manner were the signatures procured to the

Digitized by Google

instruments used as assignments of the insurance policies; that she never knew that she was signing a note, or the assignment of these policies; that the signatures to the several instruments as they appear were never obtained, and were never given, with her knowledge or consent.

I think the circumstances surrounding these various transactions, all tend to corroborate Mrs. Curtis' testimony; and so far as that of Mr. Penney, and the testimony of the subscribing witnesses to the assignments of the policies, is contained, it fully sustained hers. It appears from the testimony that of all the signatures she made to the blanks, which subsequently turned out notes in the bank against her and her husband,—and there were about 20 of them,—no person ever saw her sign one of them, unless it was her husband. The signatures to the assignments alone are witnessed, and both these witnesses swear they did not see her make them.

Mr. Elwood, who had the dealings with Mr. Curtis in all these matters, says he never said a word to her about any of these transactions, from the beginning to the end, previous to the husband's death, and knew nothing of Mr. Curtis' authority to use the name of his wife as he did, except what Mr. Curtis told him, and never had any correspondence with her previous to the death of Mr. Curtis; neither did he know whether she had any property or not. The entire correspondence and business was had with Mr. Curtis. He presented the papers at the bank, and received the money thereon; and neither the bank nor Mr. Elwood ever knew whether she received any of the money or not. She herself testifies that she never received a farthing. That these policies were assigned in compliance with the "oft-repeated promises" of Mr. Curtis to the bank I have no doubt, but I find nothing in the record satisfying me that it was done with the knowledge or consent of his wife.

The fourth, fifth, and seventh propositions of counsel for

Digitized by Google

the bank are sustained by the evidence, but these cannot change the result.

It is claimed in the ninth and tenth propositions of defendant's counsel that there is no evidence of any assignment of the $5,000 policy to Mrs. Curtis, or that she ever had any title to that policy, and that the assignments executed by Mr. and Mrs. Curtis to the bank were in all respects legal. I do not take this view upon these questions. It would seem that the bank did not take this view when the assignment of the $5,000 policy was made to it. That policy is made payable to the assured or his assigns; and it was entirely unnecessary for his wife to join with him in making the assignment he did to the company if she was not interested in it.

The complainant avers in the bill, upon information and belief, that George E. Curtis, in May, 1876, assigned the policy for $5,000 to his wife. Mrs. Curtis also, in her answer, admits and affirms the assignment of the large policy to her by her husband; and the bank does not in its answer deny that George E. Curtis assigned the policy to his wife.

It would seem that not only good pleading, but the importance of the matter, should have received some attention in the answer of the defendant bank, if the complainant's averments were not true. If the assignment existed and was good, it constituted an indispensable link in the chain of testimony necessary to establish the bank's title. Mrs. Curtis testifies that the large policy was assigned and delivered to her by her husband; that afterwards Mr. Curtis kept them for her with his other papers. She stated that she had looked for the assignment, and could not find it; that the assignment was made on the eighteenth day of May, 1876, and that she had a copy of it, which was then put in evidence.

I think the facts herein stated, and the testimony offered, was sufficient proof of the assignment of the large policy to her, and that it was properly received in evidence.

As bearing upon the question of delivery, and sufficiency

Digitized by Google

of the proofs and pleadings, I think the wife's case is brought within our own authorities. *Young v. McKee*, 13 Mich. 554; *Shook v. Proctor*, 27 Id. 349, per CHRISTIANCY, C J., 357-361, 377; *Manley v. Saunders*, Id. 348; *Ellis v. Secor*, 31 Id. 185; *Davis v. Zimmerman*, 40 Id. 24; *Critlenden v. Insurance Co.*, 41 Id. 442 (2 N. W. Rep. 657); *Bostwick v. Mahaffy*, 48 Id. 342 (12 N. W. Rep. 192); *Thatcher v. St. Andrew's Church*, 37 Id. 264; *Latham v. Udell*, 38 Id. 238. See, also, *Champion v. Brown*, 6 Johns. Ch. 398; *Neale v. Hagthrop*, 3 Bland, 551; *Booth v. Booth*, 3 Litt. 58; *Mosely v. Garrett*, 1 J. J. Marsh. 212; *Philips v. Green*, 3 A. K. Marsh. 7.

If the assignment to the bank of the $3,000 policy was not good, I have no doubt of the validity of the policy as the property of Mrs. Curtis. It was obtained by her, and contains a clause reading as follows:

"And said company do hereby promise and agree to and with the said assured, well and truly to pay, or cause to be paid, the sum insured, to the said Alice H. Curtis or assigns, within ninety days after due notice and proof of death of said George E. Curtis. And, in case the said assured should die before the decease of said George E. Curtis, then the amount of this insurance shall be payable to their children, or to their guardians if under age."

Our statutes expressly authorize the policy to be taken in this manner. How. Stat. §§ 4238, 6300, 6301.

The obligation to pay Mrs. Curtis, under the circumstances, is absolute on the part of the company, if the assignment to the bank is not good; and whether such assignment is good or not is to be determined by the laws of this State, where it was made, and is attempted to be enforced. Upon this subject it is unnecessary to discuss the character of Mrs. Curtis' interest under these policies, or either of them, as, in the view I take, she was the lawful owner of the same, both at the time the assignment was made to the bank, and at the time her husband died.

Digitized by Google

Under the testimony in the case, I think it clearly appears she never knew that she had put her name to the assignments of these policies to the bank, and never assented to the same, or intended so to do; that she never received any consideration therefor; and that the obtaining of her signature to the assignments in the manner in which it was done was a fraud upon Mrs. Curtis' equitable rights in the premises. The assignments as to her were void; and the bank, as against her, obtained no rights therein. What might have been the effect of the transfer under other circumstances it is not for us now to consider. *Reed v. Buys*, 44 Mich. 80 (6 N. W. Rep. 111); *Tabor v. Insurance Co.*, 44 Id. 324 (6 N. W. Rep. 830); *Schlatterer v. Nickodemus*, 51 Id. 625 (17 N. W. Rep. 210); *First National Bank v. Deal*, 55 Id. 592 (22 N. W. Rep. 53); *Gibbs v. Linabury*, 22 Id. 479; *Anderson v. Walter*, 34 Id. 113; *Kenton Insurance Co. v McClellan*, 43 Id. 565 (6 N. W. Rep. 88); *Benson v. Morgan*, 50 Id. 77 (14 N. W. Rep. 705); *Tompkins v. Hollister*, 60 Id. 470 (27 N. W. Rep. 651); *Putnam v. Sullivan*, 4 Mass. 45; *Nance v. Lary*, 5 Ala. 370; *Fay v. Smith*, 1 Allen, 477; *Wade v. Withington*, Id. 561; *Bank v. Bank*, 10 Cush. 488; *Gould v. Seegee*, 5 Duer, 260; *Hall v. Wilson*, 16, Barb. 548; *Barry v. Insurance Co.*, 49 How. Pr. 504; *Loomis v. Ruck*, 14 Abb. Pr. (N. S.) 385; *Eadie v. Slimmon*, 26 N. Y. 9.

I think the decree should be reversed, and a decree entered in this Court in favor of Mrs. Curtis for the amount of the policies, against the complainant, with interest to the date of the commencement of this suit, less the amount paid by the bank to redeem the policies of insurance, also the amount of any premiums paid upon said policies, or either of them, with interest from the time of payment to the time of the commencement of this suit, which should be paid to the bank; and that Mrs. Curtis should recover her costs in both courts against the bank, to be taxed by the clerk of this Court; and that the register of the court below be directed

Digitized by Google

to make payment accordingly, in accordance with the terms of the decree to be entered here.

MORSE and CAMPBELL, JJ., concurred. CHAMPLIN, J., did not sit.

AUGUSTA MERKLE, ADMINISTRATRIX OF THE ESTATE OF GEORGE MERKLE, DECEASED, v. THE TOWNSHIP OF BENNINGTON.

[See 58 Mich. 156.]

Negligence—Injury from defective bridge—Evidence—Pleading—Variance—Charge to jury—Executors and administrators—Repeal of statute.

1. A repealing statute, without a saving clause, which substantially re-enacts the law repealed, will not affect pending suits.[1]

2. The object of a pleading is to apprise the court and opposite party of the pleader's claim. Certainty to a *common* intent is all that is required in the declaration, and this is attained, in actions of trespass on the case for negligence, when the neglect of duty relied on, and resultant injury, are described with *substantial* accuracy.

   So *held*, where the declaration alleged, as the cause of the injury, the defective condition of a bridge, in that the planks were loose and the stringers uneven, whereby the planks were liable to slip off, turn over, and tip up, and thereby trip horses, and that plaintiff's horse became entangled in the loose planks, and thereby tripped, etc.; while the proofs tended to show that there was a *broken* plank, and a hole in consequence thereof, into which the off horse stepped, and then stumbled or jumped, causing the wagon tongue to fall, etc., and hence the injury.

3. Where, on the introduction of evidence of the *cause* of the injury complained of in an action for negligence, no objection was raised on account of variance from the *case* alleged in the declaration, such objection made by a motion in arrest of judgment

[1] See *Moore v. Township of Kenockee*, 75 Mich. 332.

68	133
106	888
106	702
68	133
114	881
68	133
119	288
68	133
135	*456
68	133
139	*302
68	133
144	*393
68	133
150	*330

Digitized by Google

ought to be disregarded, unless the variance is substantial, and, if so, the declaration should be treated as amended to meet the proofs made.

4. The alleged refusal to give certain requests to charge, which the circuit judge certifies were not presented to him to his recollection, cannot be assigned as error.

5. In a suit involving the condition of a bridge at time of an accident alleged to have happened by reason of its non-repair, testimony by one witness that "it was a very poor, shackly bridge," and by another that "from his personal knowledge the bridge was in good repair," is admissible.

6. Where, after the testimony of a witness that a bridge, claimed to be out of repair, was to his *personal* knowledge in good repair, was striken out as incompetent, he was permitted to state fully its condition, from which it appeared, if he was believed, that the bridge *was* in good repair, the rejection of his first statement is error without prejudice.

7. Where no reason is stated for an objection to testimony, the appellate court cannot say that the trial court erred in overruling it.

8. Where, under the testimony in a case, it is a disputed question whether, for a long time prior to the accident complained of, a bridge had been out of repair at the *place* where the accident occurred, it is proper for the court to direct the attention of the jury to the *precise place* in controversy, and to the disputed question whether *it* had been repaired.

9. The liability created by the statute for negligence resulting in the death of the injured party is a chose in action and assets belonging to the personal representative; and if the executor refuses to enforce collection, and secures his discharge, the probate court may appoint a successor to complete the administration of the estate, under How. Stat. § 5843.

Error to Shiawassee. (Newton, J.) Argued October 4, 1887. Decided January 12, 1888.

Case for injuries received on account of non-repair of bridge. Defendant brings error. Affirmed. The facts are stated in the opinion.

Isaac Marston (*S. F. Smith*, of counsel), for appellant.

G. R. Lyon and *Hugh McCurdy*, for plaintiff.

Digitized by Google

CHAMPLIN, J. When this case was heard, the Court called attention of counsel to the repeal of the statute, contained in Act No. 264, Laws of 1887, under which the action in this case was planted. The repeal is in express terms, and without any saving clause. Supplemental briefs have been furnished us upon this point. The repealing statute, however, substantially re-enacts the law repealed, with some slight modifications so as to include in the remedy afforded by its provisions damages for injuries received in consequence of the neglect of municipal corporations to keep sidewalks in repair, and to abolish the common-law liability to actions for negligence against such corporations. Upon consideration of the matter, we have concluded that the plaintiff's right of action is not affected by the act of 1887.

The injury for which the plaintiff seeks a recovery occurred July 5, 1881.

The declaration contains two counts.

The first alleges that a bridge had been constructed across Maple river, of timber and planks, laid upon stringers, in the usual manner of building bridges, and was built by the township for the purpose of being used as a bridge by the public traveling along the highway.

That it was the duty of defendant to keep the highway and bridge in good repair, and in a safe and convenient condition for public travel at all times.

That it did not keep the bridge in good repair, but suffered the same to become dangerous, and unfit for public use and travel,—

"Said planks being loose, never having been fastened to said stringers, and the stringers uneven, so that said planks became and were liable to slip off of said stringers, turn over, and tip up, and trip horses, and make them stumble, and obstruct wagons and vehicles when passing over said bridge; and said plank did slip off the stringers, became displaced, and did tip up, and trip horses, and obstruct wagons and vehicles while passing over said bridge."

Digitized by Google

The declaration then charges that while George Merkle was driving over this bridge in a careful and prudent manner, and without fault on his part,—

"The said horses which he was driving became entangled in the loose planks of said bridge, and thereby tripped, stumbled, and became frightened and unmanageable, and ran away, and threw the said George Merkle out of the wagon."

The second count charges that the bridge was dangerous, and unfit for public travel and use,—

"The planks on the bridge loose, and were liable to slip off the stringers, topple, and tip up, and trip horses and obstruct wagons, and said planks did topple, slip off the stringers, become displaced, and did tip up, and trip horses and obstruct wagons in crossing said bridge."

That as said George Merkle was riding in his wagon, and driving his horses and wagon over said bridge in a careful and prudent manner, and without his fault, his horses became entangled in the loose planks of said bridge, and thereby tripped, stumbled, and became frightened and unmanageable, and ran away, thereby throwing said George Merkle out of his wagon upon a pile of stones by said public highway, whereby he was injured so that he died.

The defense was the general issue.

The cause was tried before a jury, who gave a verdict for the plaintiff.

The defendant submitted four special questions to the jury, which, with their answers thereto, were as follows:

"*Q.* Did Mr. Fisher, as overseer of highways in the district where this bridge was situated, repair the same in a proper manner, between the twentieth and thirtieth days of June, 1881?

"*A.* No.

"*Q.* Was the fact that one of Mr. Merkle's horses stepped into a hole in the bridge, as testified to by Anna Merkle, the direct cause of the injury?

"*A.* Yes.

Digitized by Google

"*Q.* Did Mr. Merkle see this hole on his way to Owosso that morning and consider it dangerous?

"*A.* Yes.

"*Q.* Could Mr. Merkle, on his way back, by the use of ordinary care in driving on the east side of the bridge, have passed over the same with safety?

"*A.* No."

Anna Merkle, referred to in the second special question, is the daughter of George Merkle, who was injured by the accident, and is the only living witness who was present when it occurred. She testified respecting it as follows:

"We were coming from Owosso. We drove over the bridge to this plank, and the horse got scared, acted as though he got caught in the plank, and gave an awful jerk, and I heard something break and something fall onto the bridge. The wagon run on the west side, down this bank, and threw my father out onto a pile of stones, and I jumped out and the horses got away.

"*Q.* Did you see, then, anything in relation to the situation of the planks on the bridge?

"*A.* Yes, sir.

"*Q.* When the horses went upon them, how were they, as to rattling?

"*A.* They rattled.

"*Q.* As the horses walked over them, they rattled as they walked?

"*A.* Yes, sir.

"*Q.* Now, you stated to the jury that when they came to this plank; what do you mean by that?

"*A.* That was the plank where the horse acted as though he got caught. I turned around to see what was the matter, and the plank, it was slipped out from the west end of the bridge, west side rather, and it left a hole, and it looked as though it was cut cornerwise, angling of the board; it looked as though it was slipped back over the other one.

"*Q.* That was where the difficulty occurred?

"*A.* Yes, sir; that was the difficulty in the bridge; yes, sir.

"*Q.* Where the difficulty occurred with the horse?

"*A.* Yes, sir.

"*Q.* How did the horse jump; suddenly?

"*A.* Yes, sir; he acted as though he got caught pretty tight.

Digitized by Google

"*Q.* What did your father do then; when the horse jumped, what did he do?

"*A.* He looked over the dash-board to see what was the matter. He didn't say anything.

"*Q.* What did he do with reference to trying to hold them?

"*A.* He had hold of the lines and pulled them back with all his might, but it seems as though he could not manage them.

"*Q.* State to the jury just how the horses acted there? Did they at once jump into a run?

"*A.* No, sir, the off horse, that is the horse on the west side, gave an awful jerk as though he was caught, and then they tried to get away from the wagon; they jerked and pulled, but didn't get away from the wagon on the bridge.

"*Q.* As you recollect it, when did the horses finally get loose from the wagon?

"*A.* After they had gone down the bank and threw my father out. I jumped out. I fell. As I got up, the first thing I saw was the horses just turning, I guess it is what you call the turnpike."

On her cross-examination, she testified that on the way going to Owosso with her father, in the morning, she did not notice anything on approaching the bridge; that she did while crossing; that her father said there might be an accident happen there sometime. He was looking to the west side of the bridge. It attracted her attention, and she saw there was a plank bowing up on the west end.

"*Q.* Was it a plank bowing up, or was there a hole?

"*A.* I didn't notice a hole. I didn't notice at that time. I noticed the plank being bowed up.

"*Q.* Didn't your father make the remark that there was a hole there, and somebody might get injured?

"*A.* No, sir; he simply said there might an accident happen there sometime."

The witness was then cross-examined as to the testimony given upon a former trial of the case, from which it appeared that she testified that when going north with her father towards Owosso, that morning, she observed a broken plank that was loose between the south end and middle of the

Digitized by Google

bridge, on the west side, which was the place where the plank flew up when they came back; that it was broken from the corner crosswise; there was a piece broken angling off the end, and there was a hole there.

"*Q.* Which side of the bridge did your father drive upon on his way back; the east or west side?

"*A.* I don't know; I guess he drove through the center of the bridge.

"*Q* Don't you remember he drove on the west side, so the horse got his foot caught in that hole, the hole being on the west side?

"*A.* This hole was on the west side.

"*Q.* He drove on the west side, so the horse put his foot in that hole?

"*A.* No, sir, you are mistaken; I didn't say that.

"*Q.* Where did he put his foot and get caught?

"*A.* I don't know.

"*Q.* It was at this same plank where there was a hole and it was broken, was it not?

"*A.* I didn't say he put his foot in that hole on the west side of the bridge.

"*Q.* It was that same plank where he got caught?

"*A.* Yes, sir.

"*Q.* There was not anything else that you observed but the hole that he could get caught in?

"*A.* No, sir; I couldn't see anything else.

"*Q.* So that defect, or that hole, at that particular place, was the only thing you noticed on the bridge, and that being the place where the horse made this jump?

"*A.* That is what I saw when looking back.

"*Q.* You didn't notice any other place?

"*A.* No, sir."

Further extracts were read in evidence to the jury from the testimony given on a former trial, in which she stated that the "horse got his foot caught in that hole." And the attorney for the plaintiff also read from the stenographer's minutes of the testimony of the witness, given upon such former trial, to show that the witness stated that she did not see the horse's feet caught, but that she knew he got caught by his giving an awful jerk; that she looked back and saw

Digitized by Google

the plank; that it was lying over the other one; that it had moved out of position.

After the jury had rendered a general verdict for the plaintiff, defendant entered a motion in arrest of judgment, for the reason that the jury, by their answers to the special questions, found that one of the horses of the deceased stepped into a hole in the bridge, as testified to by Anna Merkle, and that such was the direct cause of the injury, and that no such cause was or is alleged in the plaintiff's declaration.

The motion was overruled, and counsel for defendant insist that such ruling was erroneous, and they further insist that there was a fatal variance between the declaration and the evidence offered to sustain it, viz.:

1. That the declaration alleges that, because the planks were loose, and the stringers uneven, the planks were liable to slip off, turn over, and tip up, and thereby trip horses; that the horses did become entangled in the loose plank, and thereby tripped.

2. That the direct and only evidence upon the subject showed that there was a broken plank, and a hole in consequence thereof; that the off horse stepped into this hole, and then stumbled or jumped, causing the wagon tongue to fall; hence the injury.

The case of *Batterson v. Railway Co.*, 49 Mich. 184 (13 N. W. Rep. 508), is cited in support of the objection here taken. There is no analogy between the two cases. In the *Batterson Case*, this Court held that the intention of the pleader, as appeared from the averments of the declaration, was to complain of defects which existed in the main line of defendant's railroad which caused the injury to the plaintiff, when his proofs showed that the defect which occasioned the injury was not upon the main track, but upon the side track, or switch.

"The testimony fixed the theater of the imputed negligence, and the place of the injury, on an unballasted side track,"—

Digitized by Google

Where a different measure of duty rested upon the defendant, as regarded its employés, from that which would have been imposed upon it if the scene of the accident had been the main track. *Batterson v. Railway Co.*, 53 Mich. 125 (18 N. W. Rep. 584).

In this case, the theater of the injury is the same, whether the primary cause was occasioned by a hole caused by a piece having been broken out of the plank, which had become warped, and bowed up, or by a hole caused by the horse hitting the plank with his hoof in such manner as to get caught between the planks. In either case, the defect was due to the condition of the planking of the bridge, rendering the same unsafe and unfit for public travel.

The object of a pleading is to apprise the court and opposite party of the pleader's claim. Certainty to a common intent is all that is required in the declaration, and this is attained, in actions of trespass on the case for negligence, when the neglect of duty relied on, and resultant injury, are described with substantial accuracy.

In this case, the declaration was sufficiently specific, and the proofs were not so variant as to the particular defects which caused the injury as to be fatal to a recovery. The testimony introduced by plaintiff, by the mouth of many witnesses, fully sustained the declaration as to the defective condition of the planking upon the bridge. The testimony of Anna Merkle, bearing upon this point, is given above. She says she did not see the horse's foot when it got caught in the bridge. She saw him jerk very hard to get it loose, and looked back, and saw the plank displaced and slipped back across the other plank.

But the objection of variance is disposed of in this case upon well-recognized principles. The testimony, when introduced, was not objected to on the ground that it was not the case alleged in the declaration. On the contrary, the evidence as to the horse being caught in a hole was introduced

Digitized by Google

by defendant from the stenographer's minutes of the testimony given upon a former trial. Under such circumstances, the objections raised, ought, after verdict, to be disregarded; or if the variance was substantial, the declaration ought to be treated as amended to meet the proofs made. Here there was no surprise to the defendant as to what it was called upon to meet. The variance alleged was more a matter of detail than of substance. The defendant introduced a large number of witnesses to controvert the evidence that there was any hole in the bridge, or that it was out of repair and, under the principles laid down in *M'Hardy v. Wadsworth*, 8 Mich. 349, and *Stone v. Covell*, 29 Id. 359, the objections taken on the ground of variance must be overruled.

We should notice here the requests of counsel for defendant, based upon the question of variance. These were requests numbered seven and eight. They are embodied in the bill of exceptions, but the circuit judge certifies that he has no recollection that such requests were presented to him or brought to his attention. There appears to be some mistake about these additional requests; and, under the record as it stands, we do not think the counsel for defendant are in a position to predicate error upon the fact that they were not given.

It was held in *Stone v. Covell, supra*, that where testimony was introduced, and the party relying upon variance made no objection on that ground until his request to charge, when it was brought to the attention of the court for the first time, it was too late, and the objection would be deemed waived. Had these requests been brought to the attention of the court, he might have refused them for the reasons stated in *Stone v. Covell*.

It is further insisted that as the jury, in answer to the second special question, found as a fact that one of Mr. Merkle's horses stepped into a hole in the bridge, as testified to by Anna Merkle, and it was the direct cause of the injury, and

Digitized by Google

this cause not having been alleged in the declaration, the motion in arrest of judgment should have been granted. What we have said covers this point.

Mary Deer, a witness on the part of the plaintiff, added to one of her answers: "It was a very poor, shackly bridge." Defendant's counsel asked that this be stricken out. The court refused. George Rowell, a witness on the part of the defendant, in answer to a question said: "From my personal knowledge the bridge was in good repair." This, on motion of the plaintiff's attorney, was stricken out. To each of these rulings counsel for defendant excepted. Counsel insist that both of these rulings cannot be correct. In this we agree. The first ruling was correct, and the latter erroneous. The error was one, however, which did not prejudice the defendant, we think.

The witness was next asked:

"*Q.* What did you notice,—what defects, if any? Point them out.

"*A.* I didn't notice any defects.

"*Q.* How did you find the plank, as to whether they were sound or otherwise?

"*A.* As far as I know, they were; I saw no defective plank.

"*Q.* What holes, if any, did you discover in the bridge; what parts or places?

"*A.* Nothing but the usual cracks between the planks."

The witness further testified as to what kind of planks were used, their thickness, the way they were fastened, and what and when repairs were made prior to the accident. It thus appeared from his testimony, the weight and credibility of which were for the jury, that the bridge was in good repair. The facts upon which his opinion would have been based were all placed before the jury; and, while his opinion was admissible for such weight as the jury chose to give it, its rejection could not have had a prejudicial effect upon the minds of the jurors. *Chambers v. Hill*, 34 Mich, 523, 525.

Digitized by Google

The ruling seems not to have been very rigorously adhered to, as the witness Robert Wilcox, introduced and examined on behalf of defendant, when asked as to the condition of the bridge, answered without objection: "Well, I thought it was in good repair;" and again he was asked: "What had you noticed upon these occasions?" *A.* "I thought it was in good shape." Likewise, the witness Milton E. Fisher was asked, by counsel for defendant: "After making those repairs, what condition did you then leave the bridge in?" To which he answered, "In good condition."

Error is assigned upon a question asked the witness Fisher, as follows:

"Don't you remember, when you started off down to fix that bridge, the doctor was there, fixing this boy's hand that got hurt, and didn't Mary say to you: 'You town officers are a nice set of men; you shut the barn-door after the horse has got away; now you will fix the bridge after the man has got hurt?'"

The question was objected to, but the ground of objection was not stated. The witness was permitted to answer and said:

"I don't recollect of hearing of any such thing."

As no reason was assigned for the objection, we cannot say that the court erred in allowing the question. *Young v. Stephens*, 9 Mich. 507; *Snyder v. Willey*, 33 Id. 490; *Ward v. Ward*, 37 Id. 259, and cases cited.

The sixth request made by defendant reads as follows:

"If you find that the overseer of highways, Mr. Fisher, repaired the bridge carefully and properly, and that such repairs were made on or after the twenty-seventh day of June, 1881, and you further find that, between the date of such repairs and the time of the accident, one of the planks became broken, or slipped to one side, thus leaving a hole in the bridge, where the horses stumbled, I charge you, in the absence of testimony bringing home to the proper township officers knowledge of such defect, the plaintiff could not recover, as the defect, under such circumstances, was not of

Digitized by Google

such long standing, or of that character, that knowledge thereof could be charged against the township."

This instruction was given by the court to the jury, with this addition:

"But this depends upon whether the repairs on the thirtieth of June covered the place where this alleged accident occurred by reason of defects in the bridge."

Counsel for defendant claim that there was certainly evidence tending to show that the bridge had been repaired; that there was also evidence tending to show that this hole was caused by a broken plank; and that the request was, if the jury found that, between the date of the repairs and the time of the accident, the plank became broken, or slipped to one side; and that, under the addition made by the court, unless the jury could say that the particular plank which broke had been put in, or something done to it by the overseer on the thirtieth of June, the township would be liable, although on that date it appeared to be sound, properly secured, and safe.

We do not draw the same inference from the addition made by the court that the learned counsel do. Under the testimony in the case, it was a disputed question whether, for a long time prior to the accident, the bridge had been out of repair at the place where the accident occurred; namely, the loose and warped condition of the planks, and the hole caused by one of the planks being broken. Defendant's witness Fisher had testified that he repaired the bridge between the twentieth of June and the first of July; that he traveled across the bridge in the forenoon of the day of the accident, and the bridge was then in good repair; that, in the afternoon after the accident, he examined the bridge, and found the ribbon broken a short distance from the south end, and found a plank had been turned over right where he had repaired the plank that was broken off by replacing it with a new plank; that the plank was not broken, but simply

Digitized by Google

warped up. We think it was proper for the court to direct the attention of the jury to the precise place in controversy, and to the disputed question whether it had been repaired.

One further objection remains to be noticed. The deceased left a last will and testament, which, upon petition of Mrs. Merkle, was admitted to probate September 12, 1881. The executor named therein qualified, the estate was administered and closed, and the executor discharged. It is admitted that Mrs. Merkle requested the executor to commence suit against the township, and he refused.

After the executor was discharged, Mrs. Merkle, on November 3, 1883, filed a petition in the probate court, setting forth that George Merkle had died, leaving a last will and testament; that he was possessed of real and personal estate, etc.; and praying that administration be granted to her. Due notice of the application was given, and on the third day of December, 1883, letters were issued to said Augusta Merkle, with the will annexed, under which she has done nothing but to commence and prosecute this suit. It is claimed that the probate court had no jurisdiction to make this appointment.

The objection is without force. The liability created by the statute in cases of this kind is a chose in action which is assets belonging to the personal representative; and if the executor named in a will refuses to prosecute, or, in other words, refuses to enforce collection, and reduce the assets to a chose in possession, for the purpose of distribution under the statute, and proceeds and closes his administration of the estate, and procures his discharge, disregarding the rights of the widow and children of the deceased, another person may be appointed to complete the administration of the estate so left unadministered, under How. Stat. § 5843. It would be a sad failure of justice if the executor or administrator could defeat the right of the widow and children, and deprive them

Digitized by Google

of the rights secured to them by the statute, by refusing to prosecute the suit and resigning his office.

The judgment is affirmed.

The other Justices concurred.

ADANIRAN J. CASS ET AL. v. JOHN O. GUNNISON, ADMINISTRATOR, ETC., ET AL.

[See 58 Mich. 108.]

Sale—Passing of title—Chattel mortgage—Constructive notice—Residence.

1. On a sale of $3,000 worth of lumber out of any one of three grades, without further designation, marking, or setting apart, to be loaded on the cars as ordered, the title will not pass until the lumber is so loaded.
2. A mortgage of all the lumber *now* on hand at a certain mill, and in transit, belonging to the mortgagors, being the lumber purchased of the mortgagees, is not constructive notice of a lien upon lumber shipped to the mortgagors by the mortgagees, and by them delivered to a third party, *after* the execution of the mortgage.
3. A man's residence cannot be in one city, and his family occupy a homestead owned by him in another, where he visits them every two weeks and makes his home.
4. Under the evidence in this case, defendant's testator, Hewitt, is held not to have been guilty of any fraud in obtaining the title and possession of the lumber in suit.

Error to Mecosta. (Fuller, J.) Argued October 13, 1887. Decided January 12, 1888.

Replevin. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Digitized by Google

D. F. Glidden and *Frank Dumon*, for appellants.

Mitchell & McGarry, for defendant Gunnison.

MORSE, J. This is a suit in replevin, brought by the plaintiffs under and by virtue of a chattel mortgage, for the possession of a certain amount of lumber claimed to be covered by and embraced in said mortgage.

The case has been here once before, and the main facts of the controversy are stated in the opinion of Mr. Justice SHERWOOD, reported in 58 Mich. 108 (25 N. W. Rep. 52). The defendants had judgment in the court below.

I do not consider it necessary to discuss all the errors assigned by plaintiffs' counsel. The plaintiffs must stand upon their own title, and, unless their chattel mortgage entitles them to the possession of the lumber, they must fail in this action.

A careful examination of the record convinces me, in the first place, that the mortgage as executed did not cover but little, if any, of the lumber replevied. The mortgage was executed on the third day of August, 1883, and described the lumber mortgaged as follows:

"And also all the lumber now on hand at said mill [Hewitt, Stevens & Co.'s mill], and in transit, belonging to said first parties [Oliver and Stevens], being the lumber purchased from said second parties [the plaintiffs], and also all stock manufactured from said lumber."

The court was clearly right, from the evidence adduced by plaintiffs, when he instructed the jury that the title of the lumber sold by the plaintiffs to Oliver and Stevens did not pass until it was loaded upon the cars. The contract was verbal, and by it Oliver and Stevens bought of plaintiffs $3,000 worth of lumber. No particular class of lumber was designated in quantity. Oliver and Stevens were to have this amount out of any of three grades, as they might order; they could take all of one grade, or all of two grades. There was no designation, marking, or setting out of the lumber;

Digitized by Google

there could not be, under the terms of the agreement of sale. When they ordered a bill of lumber, plaintiffs loaded it, and then the title passed, and not till then.

Mr. Gale, one of the plaintiffs, testifies as to how the orders were filled:

"We would then instruct Hood, Gale & Co. to ship to Oliver and Stevens, at the mill stated, such and such lumber, giving the widths, lengths, dimensions, etc., and to send bills of lading to us. We made invoices from Hood, Gale & Co.'s memorandum. We were to ship the lumber as they ordered it from time to time."

He also swears:

"I don't think it made any difference what lumber I put in to fill in exchange of that that had been already agreed upon, provided I could get my price for it, and I made as much money as on the other; and I did substitute the one car of good lumber, and what hemlock there was,—nine or ten thousand feet."

An attempt was made on this trial to show that certain piles of lumber in the yard of Hood, Gale & Co. were examined, marked, and designated by one of the plaintiffs and Oliver as the lumber to be purchased, but the attempt was a signal failure. And there was no evidence to show that any of the lumber shipped came out of any of the piles examined by Oliver.

The amount that had been shipped or was in transit when this mortgage was executed was inconsiderable. The court, upon this branch of the case, further correctly charged the jury as follows:

"It is quite clear that Stevens and Oliver had not the lumber at the planing-mill mentioned in the mortgage, and did not have title to the property described, or intended to be described, at the time the mortgage was given, and it had not yet been designated or set apart. In fact, neither party could go to the place where the lumber was and point out what was described, or intended to be described, in the instrument." See *Cass v. Gunnison*, 58 Mich. 114 (25 N. W. Rep. 52).

Digitized by Google

There was no evidence that Hewitt had any notice of this mortgage whatever, except as far as its record was constructive notice. This lumber was purchased by Oliver and Stevens for the express purpose of turning the same out to Hewitt in part payment of the interest they had bought of him in the planing-mill. The description of the lumber conveyed by this chattel mortgage would not inform him that it covered lumber shipped by plaintiffs to Oliver and Stevens, and received of them by Hewitt, after its execution. It would not have been error for the court to so have instructed the jury; but he left the question to them to determine. If they could find from the testimony what lumber was covered by the mortgage, and that the lumber shipped afterwards had, before the execution of the mortgage, been so determined and designated that the parties to the instrument themselves knew what particular lumber was to be delivered or covered by the mortgage, they were authorized by the court to hold Hewitt, from the description in the mortgage, if properly filed, to a constructive knowledge of the fact that such lumber was so covered and embraced in the mortgage. This was more favorable to the plaintiffs than the law, in my opinion, would warrant.

The mortgage was filed in the city of Big Rapids on the thirteenth of August, 1883. It is conceded that Oliver was a resident of Grand Rapids. Stevens testified that he first came to Big Rapids in July, 1883. At that time he was a resident of Grand Rapids, and owned a house and lot in that city, in which house he and his family lived, and had resided for several years previous. When he left the latter place for Big Rapids, he offered his house for sale. He swears that he went to Big Rapids with the intention of making his home there. He did not move his family to Big Rapids until the last of August. He did not sell his house and lot in Grand Rapids, and moved back there in the spring of 1884. His wife and

Digitized by Google

child lived in the house in that city until they moved to Big Rapids.

The circuit judge correctly ruled that he did not gain a residence at Big Rapids until he moved his family there. Consequently, the filing of the chattel mortgage in that city was not constructive notice to Hewitt.

Stevens' residence could not be in Big Rapids, and his family occupy a homestead in Grand Rapids, while he was living with them, owned the place, and went home to them every two weeks. His residence ended at Grand Rapids, and commenced at Big Rapids, when he procured a house at the latter place, and moved himself, his family, and household goods into it.

The only remaining question to be disposed of relates to the good faith of Hewitt's purchase or holding of this lumber by virtue of his sale of a one-half interest in the planing-mill to Oliver and Stevens.

The court excluded all evidence of the acts and doings of Hewitt and the firm of Hewitt, Stevens & Co.,—which firm was composed of Hewitt, Stevens, and Oliver,—in regard to their firm matters and business about the mill after the date of the commencement of this suit. This exclusion was based upon and in accordance with the ruling of this Court when the case was here before. *Cass v. Gunnison*, 58 Mich. 113 (25 N. W. Rep. 54).

There is no dispute but as fast as the lumber was ordered of plaintiffs, and received by Oliver and Stevens at the Hewitt mill, it was turned over to Hewitt upon the debt of Oliver and Stevens to him, and in payment for the half interest which they had purchased of Hewitt. The title passed to him as it was so turned over, and it was immaterial what the arrangements or business was between them and Hewitt after the replevin. *Cass v. Gunnison*, 58 Mich. 116 (25 N. W. Rep. 54).

The court instructed the jury that there was no evidence

Digitized by Google

in the case tending to show that Hewitt was guilty of any fraud in obtaining the title to this lumber, or the possession of it. He was clearly right in this instruction.

The jury in this case were more favorably instructed in favor of the plaintiffs, I think, than they could legitimately claim under the circumstances. There was no evidence tending to show that Hewitt knew anything about this mortgage until he had acquired the title to this lumber, and he positively swore on the first trial, which testimony was read at the last trial, that he had no knowledge whatever of it. Yet the court charged the jury that, if they found Hewitt had notice of it, he would not be a purchaser in good faith of the lumber, and if he ascertained the existence of this mortgage before he received the lumber, and credited it to Oliver and Stevens, then it was his duty to make inquiries to ascertain what he was buying; if he knew at the outset that this lumber was to be bought on time, and it was not to be paid for, and these parties (Oliver and Stevens) could not pay for it, and that there was some claim held upon it by plaintiffs, then he bought it subject to the notice, and could not be a good-faith purchaser.

The jury evidently found he had no such knowledge. Indeed, they could not have found otherwise, from the testimony in the case. The evidence is conclusive—

1. That the mortgage did not cover the property replevied, or but a few dollars' worth of it.

2. The mortgage was not properly filed, and therefore constructive notice to no one.

3. Hewitt had no actual knowledge of the existence of the mortgage, and no such knowledge of any claim by plaintiffs upon the property as would put him upon inquiry.

4. The lumber had all been delivered to him, and the title had passed to him from Oliver and Stevens, before the issuing of the writ in this case.

Digitized by Google

5 He was a purchaser in good faith, and for value, of the lumber.

The case was fairly tried and properly submitted in the court below. If any one had reason to complain of the charge of the court, it was the defendant Gunnison.

It follows, therefore, that the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

AMELIA GEIGES v. ROBERT GREINER ET AL.

Attachment—Affidavit—Joint defendants—Execution—Delay before levy—Ejectment—Homestead.

1. An affidavit for attachment against *two* defendants, which avers that said defendants (naming them) are justly indebted to the plaintiff, is sufficient to support evidence of a *joint* indebtedness, and is a sufficient compliance with the statute.
2. A delay of two months in levying an execution, after legally issuable, is not unreasonable, and will not release an attachment levy.
3. An equitable title cannot be set up against the legal title in an action of ejectment.
4. Where the owner of two city lots supposed she had erected her dwelling-house upon one of them, as did all parties interested, but the building was found to encroach a few inches upon the other lot, which was sold on an execution against her, her homestead rights will be protected, and to that end the *supposed* division line will be treated as the *true* one.
5. Where the owner of two city lots forming one enclosure, with no visible line of separation, erected a dwelling-house upon both lots, which she occupied as her homestead, and the entire premises did not exceed in value the sum of $1,500, and were used and occupied as one lot, such homestead must be held as embracing both of the so-called lots.

68 153
71 386
68 153
83 327
68 153
89 282
68 153
108 622
68 153
138 412
68 153
143 307
68 153
145 223

Digitized by Google

Error to Kent. (Montgomery, J.) Argued October 18, 1887. Decided January 12, 1888.

Ejectment. Plaintiff brings error. Reversed, and judgment entered for plaintiff, and record remanded, etc. The facts are stated in the opinion.

Taggart & Denison, for appellant.

Fletcher & Wanty, for defendants.

MORSE, J. This is an action of ejectment, tried in the Kent circuit court before Judge R. M. Montgomery without a jury, and judgment rendered for the defendants.

The findings of fact show that for some years before June 3, 1878, the defendant Sally Kleinlogel held the legal title to the premises, which consisted of two city lots, as platted, No. 235 and No. 245 of the Kent plat, so called, in the city of Grand Rapids. She was then, and had been, a widow, and occupied a dwelling situated on said premises as the residence of herself and some of her children. On that day she conveyed the whole of said premises by quitclaim deed to her five children, to wit, Theodore, Louise, Albert, Charles, and Amelia, who were her only heirs at law. Louise is now the wife of the defendant Robert Greiner, and Amelia is the plaintiff in this suit. Plaintiff is now the owner of 16-25 of the title conveyed by said deed, and brings this suit to recover possession thereof.

Sally Kleinlogel, the mother, continued to reside in this dwelling-house as a home for herself and her children until January 6, 1885, when the defendant Robert Greiner assumed possession. After this date, Mrs. Kleinlogel lived on the premises as a tenant of Greiner, and denying plaintiff's title.

Greiner claims the entire title of the premises under attachment proceedings, and judgment, levy, and sale therein. The attachment suit was commenced April 20, 1878, by

Digitized by Google

William H. Sheller, in the Kent circuit, against the said Sally Kleinlogel and one William F. Neuhoff, and upon the same day a levy under the writ was duly made upon the lots. Mrs. Kleinlogel appeared and defended the suit. October 21, 1878, judgment was rendered in favor of the plaintiff for $277.30. On that day stay of proceedings was entered for 30 days. No further stay was granted. Execution upon this judgment was issued November 30, 1878; and on the thirtieth of January, 1879, the writ was levied upon the property; and on the twenty-second day of September, 1883, the premises were sold by the sheriff under said levy, to one Adolph Leitelt, for the sum of $400, each lot being sold separately for $200.

After the expiration of the time for redemption, and on the sixth day of January, 1885, the sheriff executed a deed of the lots to Robert Greiner, who was the assignee of Leitelt.

The circuit judge found, as a matter of law, that the sheriff's deed vested the whole title in Greiner, and that lot No. 235 was not exempt, at the time of the levy, as the homestead of Sally Kleinlogel.

The counsel for the plaintiff attack the attachment proceedings, but we think they were regular and valid. In the affidavit for the writ it was not expressly stated that the indebtedness of the defendants was a joint one; but it avers—

"That Sally Kleinlogel and William F. Neuhoff, the defendants named in the annexed writ of attachment, are justly indebted to him."

We think this sufficient to support evidence of a joint indebtedness, and a sufficient compliance with the statute.

The delay in levying execution from November 30, 1878, until January 30, 1879, was not unreasonable, and did not release the attachment levy.

The plaintiff offered testimony to show that, while the

Digitized by Google

legal title was in Mrs. Kleinlogel, she in fact held it in trust for the children, to whom it equitably belonged. It was rejected, and properly so. An equitable title cannot be set up against the legal title in an action of ejectment. *Ryder v. Flanders*, 30 Mich. 336; *Whiting v. Butler*, 29 Id. 122; *Conrad v. Long*, 33 Id. 78; *Harrett v. Kinney*, 44 Id. 457 (7 N. W. Rep. 63).

But we do not consider the sale legal as regards the homestead occupied by Mrs. Kleinlogel at the time of the attachment levy and at the time of the sale. The circuit court finds that—

"The said two lots are adjacent to each other, both fronting on Kent street, and together form one inclosure, there being no fence or visible line of separation between them. Said dwelling is mainly on lot 235, the south lot; but the north wall, being of brick, encroaches on lot 245 from eight to eleven inches. The house was erected by Sally Kleinlogel, and was by her intended to be built entirely upon the south lot. She and all the parties to the suit supposed that the house was entirely on the south lot, and resided therein as above set out, all continuously so supposing, until after the first trial of this cause. The sheriff who made the sale also so supposed."

It is now contended that because the widow made this mistake of a few inches in relation to the boundary line between these two lots, which mistake was shared by all the parties interested in this controversy, she must lose all homestead rights in the premises.

This holding would be against justice and equity, as well as against the liberal rule prevailing in favor of homestead exemptions. For the purposes of this suit, the supposed line must be considered as the true line between these lots. The sheriff's deed, therefore, failed to convey any title to the homestead then occupied by the widow, and she had a perfect right after the attachment levy to deed it to her children.

The defendant Greiner cannot be allowed, as the assignee

Digitized by Google

of Leitelt, the execution purchaser, to acquire more land in the south or homestead lot than he supposed he was buying, especially when such holding would destroy a homestead right of which he had full notice.

The majority of the Court are also of the opinion that under the circumstances of this case, as found by the circuit judge, the homestead of Mrs. Kleinlogel must be considered as embracing both of the so-called lots. The size of the lots does not appear, but they have always formed one inclosure, with no visible line of separation between them. The whole premises do not equal in value the amount of the homestead exemption under the statute, and the same was used and occupied as one lot. The size of the lots does not appear, but the location of the dwelling inclines the Court to the belief that she is entitled to the whole inclosure as a homestead.

Judgment will therefore be entered here in favor of the plaintiff for the whole premises, with costs of both courts, and the record will be remanded for such further proceedings as may be desired to be taken under the statute.

SHERWOOD, C. J., and CAMPBELL, J., concurred. CHAMPLIN, J., did not sit.

Digitized by Google

ELLEN V. EATON AND ORMOND F. HUNT v. ALONZO EATON ET AL.

Equity—Joinder of parties—Plea in bar—Homestead.

1. The legal and equitable owners of a judgment may join in a bill to protect a levy made upon real estate under an execution issued on said judgment; and an objection to such joinder, if available, should be raised by demurrer.
2. Where the purpose, objects, and parties in two equity suits are different, the pendency of one cannot be pleaded in bar of the other.
3. Where all of the parties who appear to be interested in undischarged mortgages claimed by the complainant, in a bill filed to secure their discharge, to have been paid and fraudulently kept alive, are before the court, the *possible* interest of others in the securities cannot be urged as a reason for denying the relief prayed for.
4. On the facts stated in the opinion, the complainant Eaton is held to have homestead, as well as judgment creditor's, rights to protect, and to be entitled to the relief sought.

Appeal from superior court of Detroit. (Chipman, J.) Argued October 19, 1887. Decided January 12, 1888.

Bill filed to secure the discharge of certain mortgages, and for other purposes. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

Griffin & Warner, for complainants.

D. C. Griffen (*J. Willard Babbitt*, of counsel), for defendants.

SHERWOOD, C. J. This case comes before us from the superior court of the city of Detroit.

The complainant Ellen V. Eaton is the wife of the defendant Alonzo Eaton, whom she married on the twentieth day of

Digitized by Google

November, 1880, and who abandoned her on the eighteenth of June, 1884, and defendants Caleb and Hiram are his brothers.

The defendant Alonzo Eaton, at the time of his marriage with the complainant Ellen V. Eaton, owned city lot No. 9, in subdivision of Park Lot 65, on the south side of Parsons street, in the city of Detroit. At the time of the marriage they went to reside on the Parsons street property, and Mrs. Eaton has continued to reside there ever since.

On the twenty-sixth day of February, 1884, Ellen V. Eaton held a claim against her husband for moneys advanced to him after her marriage, to the amount of $3,322.58. On or about the date last stated she assigned and transferred her interest in this claim to the complainant Hunt, giving him full power to sue for and collect the same. This assignment was made to said Hunt for the use and benefit of Mrs. Eaton, the assignor, and as trustee for her. Suit was subsequently brought against Alonzo Eaton upon this claim in the superior court of Detroit, by said Hunt, and on the twentieth day of June, 1884, judgment was rendered therein in favor of Hunt for $3,361.48, which judgment was subsequently affirmed in this Court. See *Hunt v. Eaton*, 55 Mich. 362 (21 N. W. Rep. 429). On the third day of July, 1884, execution upon said judgment was levied upon said lot No. 9, on Parsons street.

At the time of this levy there were two mortgages upon the lot, as the complainant was informed by her husband,—one made September 3, 1877, and made to Mary L. Eaton; the other dated February 4, 1878, and made to Fannie B. Reed. Both of these mortgages were subsequently assigned to Hiram Eaton, another brother of Alonzo. Hiram subsequently instituted foreclosure proceedings upon these mortgages in the circuit court for the county of Wayne, and a decree was rendered on or about the twenty-sixth day of February, 1885, against Alonzo Eaton and Ellen V. Eaton,

Digitized by Google

wherein it was adjudged and determined that there was due upon the Eaton mortgage at the date of the decree the sum of $1,731.66, and interest thereon from December 26, 1884; and that there was due the complainant upon the mortgage dated February 4, 1878, the sum of $420; and that there was to grow due upon said last-mentioned mortgage the sum of $20 per month from February 20, 1885, during the life-time of said Fannie B. Reed, for each month that the said Fannie B. Reed preferred to live apart from the home of said Alonzo Eaton; and that there was also due at the date thereof, for amount paid for taxes to protect the lien of said mortgage, the sum of $315.62, and interest thereon at seven per cent. from December 26, 1884; and that, in default of the payment of said amounts on or before the tenth day of March, 1885, the said property was directed to be sold at public auction by or under the direction of a commissioner, at any time after the said tenth day of March, 1885.

Said property was advertised and sold under said decree by the defendant John D. Canfield, as circuit court commissioner, on the twenty-first day of May, 1885, and the property was bid off by C. E. Warner, for the use and benefit of Ellen V. Eaton; for the sum of $4,525.

At said sale it was represented that no other claims except said decree and said levy were against the property, and such statements were made in answer to inquiries upon the subject, and in the presence of Alonzo and Caleb Eaton, who were present at the time. Neither Alonzo nor Caleb made any statement to the contrary at the time, but it is claimed that Caleb had a party at the sale by the name of Jepp, who bid upon the property in the interest of Caleb. Mrs. Ellen V. Eaton claims that the property was not worth more than the sum bid for it by Warner, and that said Jepp bid $4,500 for it. It further appears that she is ready and willing to pay the sum at which the property was struck off to Warner, and has paid the sum of $25, but, notwithstanding this,

Digitized by Google

Hiram Eaton, instigated by Caleb, has directed a resale of the property by the commissioner, and that defendant Canfield, in compliance with such direction, has already commenced advertising the property for sale again under said decree.

After the sale, and before the commissioner's deed was executed and delivered, certain other mortgages were discovered to be undischarged upon the records, as follows:

1. A mortgage by Mary M. Rossman to Augustus H. Emory, dated December 13, 1873, for $900, and December 19, 1873, assigned by Emory to Alonzo Eaton, and December 19, 1873, assigned by Alonzo Eaton to Frederick B. Hooper, and March 3, 1874, assigned by Hooper to defendant Caleb Eaton.
2. A mortgage by Mary M. Rossman to Alonzo Eaton, December 18, 1873, for $1 000, and March 4, 1874, assigned by Alonzo Eaton to Caleb Eaton.
3. A mortgage by Mary M. Rossman to Sylvester Noble, February 14, 1874, $628, and on February 21, 1874, assigned by Noble to Caleb Eaton.

On September 12, 1885, there was placed on record an assignment of the last-mentioned mortgage by Caleb Eaton to his wife, Frances A. Eaton, bearing date July 2, 1885, and Frances A. Eaton was subsequently made a party to complainants' bill, which was properly amended for that purpose.

It is claimed by the complainants that, although the last three mortgages mentioned were not discharged of record, yet they were not valid securities upon the property; that they had been paid and satisfied; and that the defendant Caleb Eaton held and continued the same upon record as an ostensible lien upon the property, and as a cloud upon the title, by a fraudulent collusion with the said Alonzo Eaton and Hiram Eaton, with a view of deterring persons from bidding upon the mortgage sale thereof other than themselves, and of preventing competition in bidding therefor, and of defeating and defrauding complainants in the collection of the amount due to them.

Digitized by Google

Six paragraphs of the bill of complaint contain the allegations of fact bearing upon the alleged fraudulent character of the mortgages last described, and the rights of the complainants to have them dealt with accordingly. The prayer of complainants' bill is substantially as follows:

1. That these three mortgages may be decreed to be no longer a lien upon the premises described, they having been satisfied and merged in the conveyance of the property to Alonzo Eaton.
2. That Caleb may be decreed to discharge the mortgages of record.
3. That Hiram, Caleb, and Canfield may be restrained from making sale under the foreclosure decree of the circuit court until the mortgages are discharged.
4. That Canfield may be directed to execute a deed to Ellen V. Eaton of the property bid off by Warner for her upon the payment of the balance of the bid, $4,500.
5. And that complainants may have such other and further relief as may be agreeable to equity.

The amended bill charged that the transfer of the last-named mortgage from Caleb to his wife (and it appears complainants had no knowledge of any such assignment until it was placed on record) was made without consideration, and *mala fide* as against complainants, and with a view and design of further defeating, delaying, and defrauding complainants, and of embarrassing them in the collection of their debt, and prayed that the said assignment might be set aside and held for naught, and that Frances Eaton might be decreed and declared to discharge the same of record.

Defendants Caleb and Alonzo Eaton answered, denying the material allegations of complainants' bill with respect to the said three mortgages.

Defendant Frances A. Eaton pleaded and answered to the amended bill, wherein by her plea she set up certain proceedings pending in the circuit court for the county of Wayne, in chancery, for the foreclosure of said mortgage, which was assigned to her, and which proceedings she alleges were com-

Digitized by Google

menced in said court on September 12, 1885, and which she claimed by such plea were a bar to complainants' bill in this cause. This plea was followed by an answer which denied all the material allegations of the amended bill, and in which she averred that the said mortgage was transferred to her for a valuable consideration, and without any design of defeating, delaying, or defrauding complainants.

The defendants all filed separate answers, and each denied the charges of fraud, or denied having knowledge of any of the facts from which it is claimed.

The complainants claim throughout that Caleb's and Hiram's interests in the matter are identical, and that Caleb, acting in collusion with Alonzo, allowed his own wife, Frances, to use the Noble mortgage to aid him in his efforts through trickery and fraud to defeat the complainants in collecting their debt.

A large volume of testimony was taken in the case, which was heard before the learned judge of the superior court of Detroit, who, after due deliberation thereon, rendered a decree substantially in accordance with the prayer of the bill. All the defendants appeal.

The $1,000 mortgage given by Mary M. Rossman to Alonzo Eaton, and by him assigned to Caleb, was discharged of record during the pendency of this suit in the court below.

Upon the undisputed testimony in this case there could be no objection to joining the complainants in this suit, as has been done. Hunt held the legal title to the judgment, while the equitable ownership of the claim was in Ellen V. Eaton. But if there had been such objection, the defendants should have resorted to a demurrer.

Neither can the plea of defendant Frances A. Eaton be sustained. Her suit to foreclose the Noble mortgage cannot be made a bar to this suit. The purpose, objects, and parties in the two suits are different, and her plea has no application to the case; and it would be most unjust to allow

Digitized by Google

such a plea to prevail, since the Noble mortgage has long since been discharged of record. Story, Eq. Pl. § 736.

It is insisted by counsel for the defendants here that the only possible claim the complainants can have is that of an ordinary execution creditor, seeking to set aside a paid-up or satisfied mortgage allowed to remain of record undischarged, but claimed by the holder as a valid existing security as against the rights of complainants.

We do not think the creditor rights of Ellen V. Eaton in this case were the only interests she had to protect in this suit. From the time of her marriage her husband, Alonzo Eaton, had been indulging spendthrift habits. He was not only dissipated, but failed to provide for his family. He allowed the interest to accumulate upon the valid mortgages upon his property, and allowed the mortgagees to pay the taxes upon the homestead to protect their securities. So far as appears it was his wife's only homestead, and which he had himself not only abandoned, but, after doing so, conspired and confederated with others to revive old paid-up mortgages against the same, which, if allowed to be foreclosed, being prior to her marriage, would not only deprive her of collecting her debt, but would further and finally result in cheating and defrauding this wife out of her home and her homestead rights. We think her bill covers the case, and courts of equity cannot allow such a result.

The case of *Brigham v. Fawcett*, 42 Mich. 542 (4 N. W. Rep. 272), cited by counsel for defendants, has but little or no application to the case here. It was to protect her home as well as collect her judgment that Mrs. Ellen V. Eaton caused the bill in this case to be filed. It is not the only theory (as is claimed by counsel for the defendants) upon which the old mortgages can be held fraudulent and void that Ellen V. Eaton has a judgment upon the property, based upon money lent to her husband upon the faith of Caleb's statement to her that no mortgages except those to Mary L.

Digitized by Google

Eaton and Fannie B. Reed existed upon the property. Her homestead rights were of quite as much concern as that of securing her judgment.

It is further insisted by counsel for defendants that, if the old mortgages are void as to the complainants, they may not be as to others, and therefore they should not be discharged. There is nothing, however, in this. All the parties interested in them, so far as appears, have been before the court, and if their mortgages have been satisfied there is no reason why they should not be discharged.

We have reviewed this record, and are satisfied that the conclusion reached by the judge of the superior court is just, and should be affirmed.

The other Justices concurred.

68 165
80 299
68 165
87 30
68 165
89 478

CYRUS J. HOOD v. FREDERICK H. OLIN, SURVIVOR OF HIMSELF AND EMMOR WARE, COMPOSING THE FIRM OF WARE & OLIN.

Logging contract—Agreement to furnish teams—Retention of title until paid for—Application of credits—Replevin—Demand—Witness—Facts equally within knowledge of deceased person.

The law questions involved in this case are so intimately connected with the facts stated in the opinion, that to formulate them necessitates abstracting the opinion, which is not deemed desirable. The catch-words at the head of this note will give a key to points decided.

Error to Mecosta. (Fuller, J.) Argued October 25 and 26, 1887. Decided January 12, 1888.

Replevin. Defendant brings error. Reversed. The facts are stated in the opinion.

Digitized by Google

Stone & Hyde, for appellant.

Frank Dumon, for plaintiff.

SHERWOOD, C. J. This an action of replevin for a span of horses and yoke of oxen.

The plaintiff is a mortgagee of E. M. Nead, and brings the suit against Olin, who is the surviving partner of the firm of Ware & Olin, formerly doing a lumber business in this State.

Ware, before he died, made a contract with Nead, on the twenty-fifth day of May, 1885, by the terms of which Nead agreed to cut and deliver, near the shingle-mill on Pickerel lake, all the white pine and Norway timber situate on the north half of section 24, town 16 north, of R. 9 west, and was to have therefor the following prices: For making star shingles, 60 cents per M., and 40 cents for others; and for logs cut into lumber, $2 50 per M., if better than mill culls; and was to be paid between the fifth and tenth of each month. Nead was to sort the logs as directed by Ware, and securely boom the logs, when delivered, in the lake near the mill, and was to begin the job in June, 1885, and complete it within a year, and keep the mill fully stocked until December after making the contract. Ware was to become security for or furnish two teams, a span of horses and a yoke of oxen, and was to own them until paid for by Nead. He was also to pay to Nead the necessary expenses for feed, hay, and groceries, until Nead should commence making the shingles, not to exceed $300; the same to be repaid to Ware within two months after the manufacture of shingles was commenced.

Ware, however, was to be the judge of the necessity of such advances. Nead was to commence the erection of his camps at once, and commence putting in logs in June, and was to cut and skid logs in the fall, so they could be put in in the winter, and was to have not to exceed 75 cents per M. therefor, which was to be advanced by Ware, as also the expenses

Digitized by Google

in putting them on the lake in winter, not to exceed (including the money paid) two-thirds of the amount they would come to at the prices herein first mentioned; and Nead was to furnish logs to the shingle-mill so that it could run constantly after July 15 until it was shut down for winter.

It is in consequence of the failure of Nead to perform this contract upon his part that the defendant claims to be entitled to the property replevied in this case.

Nead began operations under the contract about the month of June, after which the defendant claims that Ware & Olin advanced supplies and materials to Nead, to the amount of $6,278.45, and that Ware furnished the teams as agreed, but that the firm of Ware & Olin had nothing to do with furnishing them.

Defendant further claims that Nead never completed the job; that in February, 1886, he mortgaged the teams to plaintiff, and abandoned the job; that, during the summer and fall of 1885, there were manufactured of lumber and shingles the amount of $1,864 17, and when the mill shut down on November 1, 1885, there had been advanced to Nead, besides the teams, $2,825.40; and that Nead never manufactured any more lumber or shingles; that, when Nead quit, Ware & Olin had allowed to him, including the $470 paid for teams, $6,748.45; and that under the agreement all the advances made prior to shutting down the mill in the fall were to be repaid within two months; that none of such advances have ever been repaid; and that before they should have been paid and credited to Nead, the next spring, he had abandoned the work, and to complete it Ware & Olin had been obliged to pay others $3,563.72; that, giving Nead credit for all the lumber and shingles taken from the land, his credits would amount to only $4,637.33.

The defendant further claims, that, upon a true statement of the account, Neal owes Ware & Olin $1,591.12, besides the money Ware paid for the teams, and that, under these

Digitized by Google

circumstances, Nead gave the mortgage under which the plaintiff claims to be the owner of the property in this case since the ninth day of February, 1886. This is the claim of the defendant, and his theory.

It appears that, when the dealings commenced between the parties to the contract, Ware & Olin opened an account on their books with Nead, charging him with all advances, including the teams, and that statements of these advances were from time to time sent to Nead; and the plaintiff claims that on the third day of November, 1885, Nead and Ware & Olin had a settlement, and it was found that Nead was indebted to Ware & Olin about $100.

That Nead quit putting in logs in February, 1886, at the request of Ware & Olin, and at that time Nead had paid Ware & Olin, by putting in saw and shingle logs under the contract, for all the advances he had received, and that they were really indebted to him in the sum of $679.11; that, at the time the teams were furnished to Nead, Ware & Olin had advanced only about $2,011; and that, inasmuch as Ware & Olin admitted that Nead was entitled to a credit for logs put in under the contract to the amount of $4,598.33, the credit should be given upon the earlier items advanced, and that this would pay for the teams in question, and place the title thereto in Nead, and that the law will so apply Nead's credits in this case; that the parties to the account having made no agreement as to the application, the law will make the application for them.

The foregoing statement of the plaintiff's claims constitutes his theory of the case; and he insists that the chattel mortgage authorizing the plaintiff to take possession of the property, as he did, was valid; and that the defendant was, as he claims, a trespasser in interfering with that possession; and his suit is well brought, without any previous demand.

Upon the foregoing theories of the respective parties, the cause was tried and submitted by the court to the jury. The

Digitized by Google

plaintiff prevailed, and the proceedings and rulings by which the verdict was reached we are asked to review.

It appears from the record that the suit was commenced against Frederick H. Olin and Emmor Ware; but, Ware having died before the issue was made, the defense is continued by Olin, as surviving partner.

Thirty-three errors are assigned. Nead gave the chattel mortgage while in the possession of the property. The mortgage contained a clause authorizing the mortgagee to take possession at any time he deemed himself insecure. The plaintiff took possession under the mortgage, and gave it into the custody of one Clifford to hold for him. Ware & Olin took the property from Clifford by force, and held the possession of the same when it was taken on the writ in this case.

The first four exceptions upon which error is assigned we do not think should be sustained.[1]

The fifth assignment of error is to the admission of the statement of account of property and money advanced to Nead by Ware & Olin to November 1, 1885. There was some testimony tending to support the plaintiff's theory, and it was properly admitted.

Nead was permitted to testify that, after the delivery of the contract to him, he returned it to Ware to make a copy, but he never returned it. This was the sixth exception. If error, it was harmless.

The seventh assignment is that the court erred in admitting in evidence the following letter:

---

[1] These exceptions were, in substance, as follows:

1. In permitting Nead to state who owned the property at the time the mortgage was given.
2. In not allowing defendant's counsel to cross-examine Nead to show that Ware had knowledge of the ownership of the property, and that Olin did not.
3. In not striking out Nead's answer to the question where he got the ox team,—"Mr. Ware sent it to me from Sand Lake."
4. In permitting Nead to state what arrangements he had with Ware in regard to the purchase of the oxen.

Digitized by Google

"SAND LAKE, MICH., 1—1—'86.

"E. M. NEAD,—

"*Dear Sir:* We wish you a happy new year. Mr. Ware will be up there sometime next week, and we have concluded to have you not cut any more green timber at all until we have snow. You had best keep just what men you can to skid, and let the rest go, until sledding comes; for, if we should not get any more sleighing, the green timber had better be left standing.

"Yours, WARE & OLIN."

We think this letter has some tendency to show that the writers exercised some influence over Nead as to the manner in which he should proceed with the business under the contract, and is proper, in connection with the plaintiff's other testimony upon the subject of Nead's abandoning the contract.

Nor did the court err in admitting the following letter in evidence:

"SAND LAKE, MICH., 11—4—'85.

"W. E. OVERTON,

"Big Rapids, M.,—

"*Dear Sir:* We inclose ck. to pay on Nead account to the amount we guaranteed. You will sell him nothing more on our account. We had a pretty complete settlement with him yesterday, and he only owes us now about one hundred dollars, so the prospect is fair for him to complete the job, and pay his debts, in our opinion.

"Yours truly. WARE & OLIN."

This is the subject of the thirteenth assignment, and bears largely upon the state of the account between the parties at the time. Upon the statement of the claim, as furnished by Ware & Olin, had the whole been paid at the date of this letter, it would be strong evidence to show that the teams had been paid for by Nead, and if they had, under the contract, I think a reasonable construction would be that the title passed to him. The statement of the claim contains as items the prices paid for these teams. We find no error in assignments from the seventh to the thirteenth.

Digitized by Google

The fourteenth is the refusal of the court to withdraw from the consideration of the jury the several statements of account sent by Ware & Olin to Nead, in which the prices paid for the teams were items. For reasons already given, this ruling was correct.

The remaining assignments relate to the exceptions taken on the refusals to charge, and the charge as given. The defendant's counsel asked the court to charge the jury as follows:

"1. Unless you find that defendant's possession of the property in question was wrongful, the plaintiff cannot recover; because no demand was made by or on behalf of plaintiff before suit brought.

"2. Under the circumstances of this case, a demand of defendant by plaintiff for the possession of the property in question must be shown, or plaintiff cannot recover.

"3. To enable you to find for the plaintiff, it must appear that Nead had a right to mortgage the property. If he bought the property of Seaman & Rice and Ware and Olin in the summer of 1885, unconditionally, or if he bought the property of Ware & Olin, or of E. Ware, on condition that the property was not to be his until paid for, and afterwards did pay for it, then he had a right to mortgage it, but not otherwise.

"4. The statement of account rendered by Ware & Olin to Nead, in which these teams are debited to Nead, and the fact that defendant charged Nead with the price of these teams, are not admissions that the property was Nead's, and should not be considered on that question. As a matter of book-keeping it was proper to charge the teams to Nead, and it could in no way affect the title to the property."

To the ruling refusing to give these requests counsel for defendant excepted.

The second request was properly refused. Before this could be given the court would have to pass upon questions of fact, which was the exclusive province of the jury.

The first might, with great propriety, have been given, although it was not harmful error to refuse it.

The defendant had the right to have the third request

Digitized by Google

given as requested. I do not find it given in the charge, and it was error to refuse it.

The defendant should have been permitted the benefit of his fourth request, and the refusal to give it was error. The defendant's theory of the case required this, and it was not without testimony upon which to base it, and I do not find it or the substance of it in the charge.

The following clauses of the charge as given by the court are excepted to, among others, and error is assigned upon them:

"1. It is claimed on the part of Mr. Hood, and testimony has been given tending to show, that these oxen and horses were charged to Mr. Nead in their account that they had with him on his logging contract. This contract in question and the books have been exhibited to you; the court has not seen them; also statements which contain these items charged. Also credits have appeared, it seems to me, and do appear, upon the statements and books of account of Ware & Olin, in which Mr. Nead is credited with labor performed and logs put in, and charged, among other items, with these horses and cattle."

"2. If you should find in this case, gentlemen, that these oxen and horses were charged up on the books of account of Ware & Olin to Mr. Nead, and by applying the rule which the court has stated, taking the credits as they appear, whenever that account is balanced, leaving the oxen and the horses on the one side, together with whatever may have been charged prior to the time they are charged, then give credit for all that has been paid in the way in which it was contemplated, making payments, that is, by putting in logs under this contract; as quick as you find that account was balanced, these horses and oxen were paid for. There is no question but that the weight of authority is in favor of that position.

"3. It is for you to find those facts; the court don't know anything about it. If you should find, after examining into the state of the account, that it was a fact that at any time after these oxen and horses were charged on the books the credits were enough to balance the account, or more than balance it, then the items up to that time are paid for, whether oxen, horses, or anything else. You will

Digitized by Google

examine into that matter, and ascertain when that state of facts occurred, if ever.

"4. The bare fact, however, that the oxen and horses were charged on the books—that bare fact alone—is not an admission that they were paid for. You will have to find from the books themselves—from the state of the accounts as they have been shown to you—that the credits were sufficient to balance the debit side of the account; that is, up to and including those charges."

"5. Something has been said about the construction of this contract. I don't know that there is anything ambiguous in this contract. If there is any particular clause in this contract that the counsel wish construed, the court will examine it, and give it such construction as he deems it will bear. I will say this, however, that this contract provides how these logs shall be measured; that they should be estimated by the number of shingles, stars and seconds, that they would make, —that is, the shingle logs; and the lumber logs were to be measured by the lumber they would make,—anything better than mill culls. That could not be ascertained until the lumber had been measured; and the other logs, the quantity could not be ascertained until they had b en cut into shingles, and the shingles counted. And you must take the manner in which these gentlemen conducted their business; and if they saw fit to ignore the contract, and settle by any other means, and ascertain by any other way how much they owed Mr. Nead, or how much he had put in,—if they chose to adopt any other rule,—then that would be binding upon them, no matter whether it was in accordance with the terms of the contract or otherwise."

As to the first clause, it assumes what does not appear by the testimony in the record; that Ware opened an account with Nead, relating to their dealings under the contract, and that the account contained a statement of the labor performed and logs put in by Nead, and that the same was in evidence before the jury. No such account kept by Ware & Olin appears in the record, and it was error to allow the jury to make such assumption, and in view of what followed it was clearly prejudicial to the defendant.

The next three clauses may be considered together. In the second the court alludes to the *rule of application* of Nead's

Digitized by Google

credits, or rather to what he should be credited with, under the contract as stated in the third clause. There is no statement in the contract in what manner Ware was to be paid for the teams by Nead. One thing is certain, however, and that is, if Ware did furnish them, the title to the same was to remain in him until he was paid therefor. Ware was not obliged to take his pay for the teams in Nead's work, unless he chose to, any more than Nead was obliged to pay for the teams in his labor before he could obtain them. There is no doubt but that Ware furnished the ox team; and Nead says he (Ware) paid for the horses; and I think, under the undisputed testimony in this case, it should be held that Ware furnished both teams, and that the title was in Ware when they were taken to the camp.

I am equally clear that, upon the undisputed testimony, there was no settlement made between Ware & Olin and Nead under the contract; that the statements made by the parties at the time Nead swears they took place was a mere conclusion as to about how the parties stood, basing the figures entirely upon the estimates made of the logs put in upon his own statement and estimate, before they were cut into timber or shingles, and which were never assented to as correct by either Ware or Olin, and which turned out to be entirely incorrect when the proper amount was ascertained after the logs were cut, and which makes Nead largely their debtor.

It further appears that the account referred to by the court was not a debit and credit account kept by Ware & Olin of the dealings under the contract, but simply a statement of advances made by Ware & Olin during the progress of the work, and which were to be accounted for by Nead when the contract was performed. It was unquestionably the intention of Nead and Ware both, when they made their contract, that the teams furnished by Ware were to be used on the work, and until the completion of the job; and that if,

Digitized by Google

when completed, Nead wanted the teams, he could have them by paying for them; and that until that time Nead was to have the use of them, whether upon the jobs or in his private business, but the title was to remain in Ware.

I do not think that the state of the account between the parties to the contract, during the continuance of the work provided for therein, had any effect whatever upon the title to the teams, and that the court erred in so holding.

In the fourth clause, it will be discovered, as well as in the third, the court expressly charges that the title to the property passed to Nead as soon as the balance of the account preponderated in his favor to the amount Ware paid for the teams, regardless of the progress made in the work undertaken, or as to what charges it might be found necessary to make in case Nead failed to perfom his contract, as was claimed he did by Olin.

The fifth clause has this infirmity: It submits to the jury whether another mode than that provided in the contract had not been adopted in the measurement of the lumber and determining the amount of work done by Nead, and a settlement made thereon. This, under the views we have taken, was clearly error.

The other questions raised, and which were ably discussed by counsel, we cannot now consider; but, inasmuch as a new trial is to be had, perhaps we ought to say that we are of opinion that the objection to Nead's testimony upon the ground that it was within the prohibition of section 7545, How. Stat, as amended by the Laws of 1885, p. 156, was not well taken. The case does not come within the provisions of that act.

The judgment must be reversed, and a new trial granted.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

JOHN SCRIVEN v. ELIZABETH HURSH AND ROBERT HILLOCK.

[See 39 Mich. 98; 42 Id. 563; 45 Id. 59; 49 Id. 31; 58 Id. 246.]

Mortgage—Foreclosure—Subrogation.

On the facts found by this Court (see opinion), the decree below is reversed, and one entered for complainant according to the prayer of his bill. The case is one *purely* of fact.

Appeal from Isabella. (Hart, J.) Argued October 21, 1887. Decided January 12, 1888.

Foreclosure bill. Complainant appeals. Decree reversed, and one entered for complainant. The facts are stated in the opinion.

O. L. Spaulding, for complainant.

Dodds Bros (*I. A. Fancher*, of counsel), for defendants.

Benton Hanchett, for defendant Hillock.

MORSE, J. From a careful examination of the record, and the previous decisions of this Court, we find the facts in this case to be as follows:

1. On the twenty-fifth day of May, 1863, John M. Hursh, the husband of the defendant Elizabeth Hursh, made and delivered to one John Jeffery two promissory notes, each for the sum of $200, with interest at 10 per cent.; one payable on or before the first day of January, 1864, and the other on or before the twenty-fifth day of May, 1864.

2. Various payments of principal and interest were made upon these notes, and the first had been fully paid and canceled before December 1, 1864.

3. At the same time these notes were executed, and to secure the payment of the same, the said John M. Hursh and the defendant Elizabeth Hursh made and delivered to said Jeffery a mortgage, bearing the same date as the notes, for $400, upon the west half of the north-east quarter of sec-

Digitized by Google

tion No. 22, in township No. 14 north, of range No. 4 west, in the county of Isabella and State of Michigan. Said notes and the mortgage were drawn by and in the handwriting of A. W. Dodge, of Ionia, Michigan, one of the subscribing witnesses to said mortgage.

4. On the first day of December, 1864, by some arrangement between John M. Hursh and said Jeffery, the payments before that time made upon said notes and mortgage were refunded, and the following indorsement made upon the second note:

"All payments and int. refunded December 1, 1864.

"JOHN M. HURSH.
"JOHN JEFFERY."

This indorsement was in the handwriting of Jeffery, excepting the signature of Hursh, which was in the handwriting of Hursh. At this time two new notes, corresponding exactly with the old ones, were drawn up by Jeffery, and in his handwriting, and substituted for the old ones. They were both dated May 25, 1863, and became by the agreement between Hursh and Jeffery the evidences of the debt secured by the mortgage.

5. On the twenty-ninth day of November, 1867, the said John M. Hursh and Elizabeth Hursh executed and delivered to one Cornelius N. Ganson a mortgage upon the same premises to secure the payment of the sum of $2,300,—$1,000 in two years from its date, and $1,300 in three years,—with interest upon the whole sum, payable annually. This mortgage expressly recognized the existence of the $400 mortgage to Jeffery, and was made subject to the same. This mortgage to Ganson was afterwards assigned to one Bickford.

6. On the twenty-ninth day of May, 1871, John M. Hursh conveyed the lands covered by these mortgages to one Wesley Winters, who on the same day deeded the same to the defendant Elizabeth Hursh.

7. On the ninth day of April, 1872, Elizabeth Hursh executed and delivered to John M. Hursh a power of attorney, by which she empowered him to sell and convey all lands of which she was possessed in the counties of Isabella and Clare, in this State, for such prices as to him might seem just and meet, and to execute the necessary deeds to convey the title thereto in fee.

8. The Ganson mortgage was foreclosed by advertisement, and on the twenty-third day of November, 1872, there was

Digitized by Google

due upon the same about the sum of $1,530, and the time of redemption had nearly expired. The defendant Elizabeth and her husband, John M. Hursh, were unable to redeem the premises, and on the said twenty-third day of November, 1872, the said John M. Hursh applied to Jeffery for a loan of the money necessary for that purpose. He received of Jeffery money enough, at least, for this purpose, and redeemed the premises. And on that day the said John M. Hursh for himself, and also for his wife, under said power of attorney, executed and delivered to said John Jeffery a warranty deed of the 80 acres then standing in the name of his wife, and covered by the Ganson mortgage, and other lands owned, or claimed to be owned, by said John M. Hursh, and known as "Indian Lands." Jeffery, on the same day, executed and delivered back to said John M. Hursh a bond, in which he obligated himself, upon the payment to him of the sum of $3,514.46, with interest at the rate of 10 per cent., on or before one year from its date, to reconvey to the said Hursh, his heirs or assigns, or to whomsoever the said Hursh might name, the lands conveyed to said Jeffery by the said warranty deed.

9. John Jeffery died intestate sometime in the year 1874. His wife, Louisa Jeffery, was appointed administratrix of his estate. Treating the said deed as a mortgage, on the twelfth day of June, 1876, the said Louisa Jeffery, as such administratrix, assigned the same in writing, for a valuable consideration, to the complainant in this suit; said assignment reciting that the mortgage debt was $3,514.46 and interest, and that said sum included the said $400 mortgage and notes.

10. Scriven foreclosed this deed, as a mortgage, in the circuit court for the county of Isabella, in chancery, and obtained a decree for the full amount of the bond and interest. Under this decree, taken upon default after personal service, the premises were advertised to be sold on the sixteenth day of November, 1877. November 13, 1877, John M. Hursh and Elizabeth Hursh petitioned to have the decree vacated, and the case opened so that they might appear and answer; claiming that the indebtedness of John M. Hursh at the date of the giving of the bond was only $1,800, and that the bond was conditioned for the payment of $3,514.46, because Jeffery represented to Hursh that a bond should specify double the amount of the actual consideration. Upon appeal to this Court, the prayer of the petitioners was granted. See *Scriven v. Hursh*, 39 Mich. 98.

11. On the fifth day of November, 1877, the defendant

Digitized by Google

Robert Hillock purchased the interest of Mrs. Hursh in the 80 acres. Hillock had notice of the foreclosure proceedings, and purchased subject to Scriven's claim.

12. About this time John M. Hursh died. His estate was insolvent. Scriven went no further with his foreclosure suit, and soon thereafter the heirs of John Jeffery brought ejectment against Elizabeth Hursh and Robert Hillock and another to recover possession of the premises. The plaintiffs in the ejectment suit relied upon the deed from Hursh to Jeffery as an absolute conveyance. After several trials, it was finally decided by this Court that this deed was a mortgage, and that, under the power of attorney, Hursh had no authority to execute the same, as far as this 80 acres, the property of Mrs. Hursh, was concerned. See *Jeffery v. Hursh*, 42 Mich. 563 (4 N. W. Rep. 303); 45 Id. 59 (7 N. W. Rep. 221); 49 Id. 31 (12 N. W. Rep. 898); and 58 Id. 246 (25 N. W. Rep. 176).

13. The complainant now files his bill to foreclose the $400 mortgage from John M. Hursh and Elizabeth Hursh to John Jeffery, and asks to be subrogated to the mortgagee's rights in the Ganson mortgage, and to recover taxes paid by him to protect his lien.

The theory of complainant is that, at the time the deed and bond were executed, Hursh obtained about $1,500 to pay the Ganson mortgage, and cash enough besides, together with the amount due upon the $400 mortgage and the $1,500, to amount to the sum named in the bond, to wit, $3,514.46.

The defendants answer that the $400 mortgage has been fully paid, and ought to be canceled and discharged.

Mrs. Hursh avers that she has no definite information of what passed between her husband and Jeffery at the time the deed was made, but on information and belief states that said Hursh at that date did give said Jeffery a mortgage on certain lands in Isabella county to secure him for an indebtedness equal to one-half of the amount stated in the bond. She denies that Hursh was not able to pay the amount due on the Ganson mortgage, or that he ever applied to Jeffery for a loan for the purpose of redeeming the lands from said

Digitized by Google

mortgage, or that Hursh in any way acted for her in procuring a loan from Jeffery, or in redeeming or paying said mortgage. She has no knowledge whether any part of said loan was used in paying or redeeming said Ganson mortgage, and leaves the complainant to his proofs in that regard.

She further alleges that the other lands mentioned in said deed or mortgage were of great value, to wit, of the value of $9,000, and that the title of Hursh was perfect to the same.

She denies that there is any lien existing upon the 80 acres by virtue of either the $400 mortgage or the Ganson mortgage, and denies the right of the complainant, under his assignment from Mrs. Jeffery, to any interest in either of said mortgages.

Hillock's answer follows that of Mrs. Hursh. He denies any knowledge of complainant's rights and equities in the premises, at the time of his purchase from Mrs. Hursh. except such as appeared upon the face of the assignment from Mrs. Jeffery to complainant.

The proof is conclusive that the $400 mortgage has never been fully paid, except as it was undertaken to be paid or secured by the deed from John M. Hursh to Jeffery. It is also clear that John M. Hursh obtained from Jeffery money enough to pay in full the Ganson mortgage and release it, and it is equally clear that Jeffery, his heirs, legal representatives, or assigns, have never been repaid the money so loaned. Mrs. Hursh, by her mortgage to Ganson after the time she claims the $400 mortgage was paid, recognized the existence and validity of the same, and ratified the arrangement between Hursh and Jeffery by which the payments made were refunded and the new notes executed. By her petition to open the decree of foreclosure in *Scriven v. Hursh*, 39 Mich. 98, she acknowledged an indebtedness of her husband to Jeffery of $1,800 at the time the deed and bond were executed; and in her answer in the present suit she practically admits the same thing. We think she had

Digitized by Google

knowledge of the loan of the money to redeem the Ganson mortgage, and that she acquiesced in it. We also are of the opinion that she knew of the whole transaction, and that the $400 mortgage was to be paid, and paid only, by the deed.

It follows, therefore, that she, before her assignment or deed to Hillock, had received the benefit of the $400 mortgage and the Ganson mortgage from Jeffery, by an arrangement known to her, and in which she acquiesced. She has not repaid the money received and evidenced by these two mortgages.

The complainant, by his assignment, has acquired the rights of Jeffery in the premises. He is a purchaser in good faith, and has paid value for Jeffery's interest. In equity, he is entitled to a payment of the amount due upon both mortgages, and the taxes paid by him upon the premises.

The decree of the court below will be reversed, and a decree entered here for complainant in accordance with this opinion and the prayer of his bill of complaint, and with costs of both courts.

The other Justices concurred.

Digitized by Google

STATES MCCABE v. MARON F. CANER.

Bills and notes—Pleading — Notice of fraud — Consideration — Relinquishment of rights under homestead entry.

1. Notice must be given of a proposed defense, in a suit on the promissory notes of the defendant, of misrepresentation and fraud in their procurement.
2. The relinquishment by a "homesteader" of his rights in land located under the homestead law is a good consideration for notes given to secure the payment of the price agreed to be paid for such interest.

Error to Clare. (Hart, J.) Argued November 9, 1887. Decided January 12, 1888.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

J. L. Potts and *C. W. Perry*, for appellant.

S. K. and *C. F. Gates*, for plaintiff.

SHERWOOD, C. J. This is an action of assumpsit to recover the amount due on four promissory notes, each dated the thirteenth day of October, 1879, and given for $100 and interest, and made payable at the Portland bank. The last note fell due on the thirteenth day of October, 1883.

The declaration is upon the common counts, and the plea is the general issue, with notice that no consideration was given for the notes, and that the notes were made upon a contract against public policy.

The cause was tried in the Clare circuit, where the plaintiff had a verdict and judgment in his favor. Defendant brings error.

The record discloses the facts that the plaintiff had entered,

Digitized by Google

under the homestead law of the United States, a parcel of land in Clare county subject to such entry, and received a certificate of entry from the land-office; that the notes in question were given by the defendant to the plaintiff upon the agreement of the plaintiff that he would surrender his certificate of entry to the government, and would relinquish all of his interest thereunder to the government, at the request of the defendant, to enable the defendant to locate said land, and acquire the interest of the plaintiff therein; and such was the sole consideration given for said notes.

It further appears from the testimony of the defendant, which was objected to by plaintiff, that he did surrender his homestead entry certificate back to the government; that it was more than six months after the entry before plaintiff made any settlement or established his residence upon said land; and he further gave testimony tending to show that plaintiff did not locate said land in good faith as a homestead; that he made no improvements upon the land or cultivated the same, or made the same his home; that at the time the plaintiff took the notes, and "relinquished his claim, and surrendered his said homestead entry certificate back to the United States, he was not residing upon said land."

That at the time the notes were given, the plaintiff represented, and the defendant believed, that the surrender of the certificate would "insure the defendant's being able to locate said land as a homestead; that said defendant took said relinquishment to the United States Land-office at Reed City, where he delivered the same to the register in charge, and duly located said land in his own name, residing thereon the required time, made final proof, and took out the patent therefor to himself, and the title still remains in the defendant.

That just prior to the making and delivering of said notes in question, steps had been taken by one David, under the United States statute, to have the plaintiff's entry canceled

Digitized by Google

by the government, on the same grounds heretofore set forth, and after hearing thereon the government sustained the entry of the plaintiff herein. The defendant herein was present during said hearing, and waited till the same was decided by the government, when he procured the relinquishment, as aforesaid.

No evidence appears to have been offered on the part of the plaintiff in rebuttal. When defendant closed his testimony, and after hearing counsel, Judge Hart directed the verdict of the jury.

We have no doubt about the correctness of this direction upon the defendant's own showing.

The testimony of the misrepresentation and fraud was not admissible under the pleadings, and has no rightful place in the case, and should have been excluded when objected to.

The plaintiff performed his agreement, as the testimony shows, and it was a legal one. The government had not found fault with the plaintiff's conduct in the premises, at the time the notes were given; and the testimony tends to show that it stood ready to recognize the homestead rights he surrendered for the notes, and they were a legal consideration therefor. Really, the government's right to forfeit the plaintiff's entry, if such were the case, had nothing to do with the case. If such right existed as claimed, the government could enforce it or not, as it chose. The plaintiff's relinquishment of his right in the premises was a good consideration for the notes. *Olson v. Orton*, 18 Minn. 36 (8 N. W. Rep. 878); *Thompson v. Hanson*, Id. 484 (11 N. W. Rep. 86); *Lamb v. Davenport*, 18 Wall. 307; *Myers v. Croft*, 13 Ill. 291; *Whitney v. Buckman*, 13 Cal. 563; *Sanford v. Huxford*, 32 Mich. 318; *Rood v. Jones*, 1 Doug. 188.

The judgment must be affirmed.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

R. SMITH TYLER v. THE ESTATE OF FRANKLIN GALLOP, DECEASED.

68 185
100 604

Estates of deceased persons—Commissioners on claims—Appeal—Judgment—Infants—Executory contract—Ratification—Emancipation of minor.

1. The judgment entry in the circuit court, on an appeal from the decision of commissioners on claims against the estate of a deceased person, should be an allowance or disallowance of the claim, which should be certified to the probate court.
2. In a suit on a note given by a minor, the burden of proof is on the plaintiff to show ratification after defendant attained his majority.
3. The mere *silence* of a minor for two years after arriving at full age raises no presumption of his ratification of a note given during his minority, but there must be an *express* promise after he became of age, or *acts* equivalent to a *new* contract.
4. The question of the emancipation of a minor at the time he executed a note is irrelevant to the issue in a suit on the note, as it could not affect his liability thereon.

Error to Clare. (Hart, J.) Submitted on briefs November 9, 1887. Decided January 12, 1888.

Appeal from the allowance of a claim in the circuit court, which had been rejected in the probate court. Judgment reversed and a new trial ordered. The facts are stated in the opinion.

C. W. Perry, for appellant.

Browne & Cummins, for claimant.

MORSE, J. The plaintiff presented a claim against the estate of Franklin Gallop, deceased, based upon a promissory note for $110, dated August 22, 1882, payable in one year from date, with interest at 10 per cent. The note was

Digitized by Google

signed by William Gallop and Frank Gallop (the deceased), as makers.

The claim was disallowed by the commissioners, and plaintiff appealed to the circuit court for the county of Clare.

Upon the trial in that court, testimony was given on behalf of the defendant tending to show that the note in question was given in place of another note made by Daniel Gallop, and also signed by William Gallop, to plaintiff; and that said Daniel Gallop had offered to pay the first or original note given by him to plaintiff, and had always been ready and willing to pay the same at any time, but said plaintiff had never offered to deliver said original note up to Daniel; and that said note was past due when the note in suit was executed. Further evidence was given on the part of defendant tending to show that, at the time this note was made, Franklin Gallop was a minor, and had never been emancipated by his father, the said Daniel Gallop, and that the contract contained in said note had never been ratified by Frank after attaining his majority; and that Daniel had no knowledge of the note in suit being given to take up the original note.

In rebuttal, the plaintiff introduced testimony tending to show that, when the note made by Frank and William was received by him, the original note was delivered over to them, and that it was not in his possession at the time of the trial, and never had been since the note in suit was executed and delivered to him; also evidence tending to prove that, at the time the note in question here was given, the deceased, Franklin Gallop, had been emancipated, and was doing business in his own name for his own benefit, with the consent and approval of his father, and that Daniel authorized Frank to take up the original note, and, at the time, Frank and William were in partnership, and the said note was given in the course of their partnership transactions.

The circuit judge instructed the jury, in substance and

Digitized by Google

effect, that the deceased failing to give notice to the plaintiff during his life-time, after he became of age (he having lived some two years after he became twenty-one years of age), he could not and would not be bound by his signature to said note, his legal representatives after his death could not take advantage of his silence without offering some proof, at least, that the deceased did not intend to be bound by his contract; and directed a verdict for the plaintiff for the face of the note and interest.

The judgment entry in the circuit court is not correct, or applicable to proceedings of this kind. No error is assigned upon it, but a common-law judgment cannot run against the administrator, or against the property in his hands as such, as it does in this case. The entry should be an allowance or disallowance of the claim, which allowance or disallowance is to be certified to the probate court. See *La Roe v. Freeland*, 8 Mich. 531, 534.

The only errors assigned in the record are to the charge of the court. We think the case should have been submitted to the jury. If the deceased was a minor at the time of the execution of this note, the burden of proof was upon the plaintiff to show that he had ratified it after he attained his majority. It seems from the record that there was evidence tending to prove that deceased had not ratified the contract. The circuit judge was not authorized in law to presume a ratification because of the mere silence of the deceased for two years. There must have been an express promise after he became of age, or such acts as would have been equivalent to a new contract. *Goodsell v. Myers*, 3 Wend. 479; *Wilcox v. Roath*, 12 Conn. 550; *Tucker v. Moreland*, 10 Pet. 58; *Ford v. Phillips*, 1 Pick. 202; *Fetrow v. Wiseman*, 40 Ind. 148; Tyler, Inf. (2d ed.) 84, 91, 92; *Minock v. Shortridge*, 21 Mich. 304; *Prout v. Wiley*, 28 Id. 164.

The record in this case is blind and uncertain. It appears that there was evidence tending to show that the original

Digitized by Google

note was delivered over to William Gallop and the deceased, but which one of them took and kept possession of it we are not informed; nor does it appear whether the relation of the deceased to the note sued upon was that of maker, or surety for William. We do not propose, therefore, to discuss what might be the law applicable to facts which may not be facts in the case.

The question whether or not the deceased was emancipated by his father at the time he signed this note had no relevancy to the issue. It could not affect his liability upon this note.

The judgment of the court below is reversed, and a new trial granted, with costs of this Court to defendant.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

---

68 188
143 519
68 188
146 57

EDWARD P. FOSTER v. LUMBERMEN'S MINING COMPANY.

Contract of sale—Passing of title—Price and terms of payment—Delivery—Trover and conversion—Conflict of laws—Statute of frauds.

1. An agreement for the sale of a quantity of iron ore, for a *price* per ton dependent upon *that* received by the vendee on its sale, lacks an essential ingredient of a contract of sale, and cannot be enforced.
2. In order to pass the title to personal property under a contract of sale, the purchase price must be fixed, and, if credit is given, the time and terms of payment must be stated. *Cass v. Gunnison*, *ante*, 147 (head-note 1).
3. Under an agreement for the sale of a quantity of *lean* iron ore, to be delivered on the cars by the vendor after the worthless portion was removed, as sold by the vendee to third parties, the *title* will not pass until such delivery.
4. The owner of personal property who has contracted for its sale,

Digitized by Google

but has not parted with his title or right of possession, cannot be guilty of its *unlawful* conversion.

5. A contract between a corporation and citizen of Michigan for the sale of property in said State, to be there selected, weighed, and delivered, and the contract fully performed, is subject to the statute of frauds of that State, and, in its construction, it is of no consequence where the agents or servants of the corporation reside.

Error to Menominee. (Grant, J.) Argued November 1, 1887. Decided January 12, 1888.

Trover for the conversion of a quantity of *lean* iron ore. Defendant brings error. Reversed. The facts are stated in the opinion.

Ball & Hanscom (*B. J. Brown*, of counsel), for appellant.

Kruse & Flannigan (*W. P. Healy*, of counsel), for plaintiff.

SHERWOOD, C. J. This is an action of trover to recover for the conversion of a quantity of lean ore, taken from the Ludington mine, and lying on the premises, and claimed by the plaintiff to be his property. The pile was estimated to contain about 14,000 tons, and was not uncommonly called "refuse rock." The record shows that ore yielding less than 50 per cent. of iron is usually regarded as unsalable.

The land upon which the mine was located belonged to the Lake Superior Ship-canal, Railway & Iron Company, and was operated by the defendant under a lease from that company, by which the defendant was authorized to mine and take away iron ore at a certain royalty, to be paid to the owner of the land.

In the spring of 1886, the plaintiff and John D. Jones were desirous of purchasing, or making an arrangement whereby they could sell, this rock pile, and receive a share of the proceeds, and for that purpose the plaintiff had a treaty with the managing officers of the defendant, whose attention

Digitized by Google

was first called to the subject in a brief conversation with G. E. Stockbridge, who was general manager of the company, and who informed the plaintiff that A. A. Carpenter, who was president of the company, was the man for him to treat with in the matter; that he was going to Chicago in a few days, and would then speak to him upon the subject. From this time on the arrangement seems to have been mostly made by letter. Mr. Stockbridge, from Kalamazoo, on the third day of March, 1886, wrote to the plaintiff as follows:

"*Dear Sir:* After due consultation with Mr. Carpenter, I am obliged to say that we cannot make you any price on the refuse rock pile at our mine that would warrant you in undertaking to handle it. We should have to pay a small royalty on it, and, if we paid the royalty, the rock is worth more to us to turn back into the mine than it could possibly pay you to handle it."

Mr. Foster, on March 25, wrote from Iron Mountain to Mr. Carpenter as follows:

"*Dear Sir:* Not having heard from you, and not having met Mr. Stockbridge when here, thought best to ask you if anything had been heard in regard to royalty on refuse ore, which we are talking of."

To this Mr. Carpenter replied, on March 26, as follows:

"*Dear Sir:* Yours of yesterday is at hand. I have to-day written Mr. Stockbridge, and sent him copy of your letter, and as soon as I hear from him will let you know. When he was here I did not ask him about the rock pile."

And, on the twenty-ninth of March, Carpenter, after receiving a letter from Mr. Stockbridge, wrote the plaintiff:

"*Dear Sir:* I have a letter this morning from Mr. Stockbridge, in which he says that he is satisfied by his investigations at the mine that we cannot sell the pile of rock to you at any price that you can afford to pay for it; that it is worth more to us for filling than anything that we can get out of it by selling."

On the thirty-first of March, the plaintiff replied to this letter as follows:

Digitized by Google

"*Dear Sir:* Yours of the twenty-ninth received. There is evidently a misunderstanding between Mr. Stockbridge and yourself, or some price could be named that you would take for the rock pile. I take it that Mr. Stockbridge is not the one to say what I can afford to pay for it, but to name price I can have it for, and, if satisfactory, can then come to an understanding. From assurances given me by Mr. Stockbridge I have made partial arrangements for some of it, and would like to fulfill my agreement. Will you advise me soon what can be done in the matter?"

To this letter Mr. Carpenter made the following reply:

"CHICAGO, April 5, 1886.

"E. P. FOSTER, ESQ.,
"Iron Mountain, Mich.

"*Dear Sir:* Your favor of the thirty-first ult. is at hand. The pile of rock is worth to us as it lies 25 cents a ton for filling. If you can sell it so that you and we can make something over this sum, all right; but we must first know what royalty we have to pay, and when we know this we will add this amount to the 25 cents, and you can have one-half of the amount that can be obtained for it over this sum, provided there be enough gotten over the 25 cents per ton to make it an object for us to bother with it. So let us know what you can get for it, and, if it is enough so that it will pay us, we will find out what royalty we must pay, and can then determine; but you must not sell it until we have found out what the royalty will be, and have determined whether we can get enough over the 25 cents, which the rock is worth to us, as to make it desirable for us to sell it.

"Yours truly,
"A. A. CARPENTER."

On the ninth of April, Mr. Foster wrote Mr. Carpenter as follows:

"Yours of the fifth at hand. I expect to be in Chicago on Monday, the twelfth, and think you can arrange a deal on the rock pile that will be satisfactory. Though not much money for a rich mining company, it will be worth looking after for me. Will call at your office about 10 A. M."

The plaintiff then testified that he went to Chicago on the twelfth of April, and saw Mr. Carpenter at his office, and he then said:

Digitized by Google

"I told him I could sell the ore at $1.50 per ton. 25 cents they were to receive per ton. The costs of loading and the royalty, 15 cents per ton, or 10 per cent. on the price of the sales, as Mr. Carpenter stated it, would leave me a balance of 47½ cents per ton; and the 25 cents per ton I was to pay them for what it was worth at the mine. I showed him the figures right on his desk, and he said it was satisfactory; to go ahead."

Upon his cross-examination, he said that after deducting 15 cents for royalty, 15 cents for loading, and 25 cents for the ore, from the price obtained on sale per ton, it left 95 cents, which was to be divided equally between the plaintiff and defendant; that the defendant was to be allowed half in addition to the 25 cents for the ore.

The foregoing constitutes the contract as stated by the plaintiff, under which he claims the defendant sold to him the pile of rock referred to. In regard to the interview of the twelfth of April, Mr. Carpenter testified that—

"There was not a word passed between us at that interview in regard to the sale of the rock pile. There is not a particle of foundation for it."

That, at the time, the defendant was paying a royalty to the owner of the land of 50 cents per ton; and that he did not know until the twenty-third of April what arrangement could be made per ton on the lean ore. Mr. Carpenter, in his testimony, further says that, in the interview with Mr. Foster on the twelfth of April,—

"I said to Mr. Foster just what I have said in these letters,—that the rock pile was worth to us 25 cents [per ton] as it lay. Add to that the cost of loading on the cars, and paying the royalty,—which I did not know what it would be,—and if he could find a purchaser of it, so that we could get anything more out of it, all right; he should have half of it. At that time there was not a word passed between Mr. Foster and me about the sale of the rock pile to him, and there never has been from that time to this."

In the foregoing we have the version of both parties as to

Digitized by Google

what was done and said on the twelfth of April while they were together, and when the contract was made according to the plaintiff's theory, if one ever was made between them, and from which he claims an absolute sale of the rock pile to him. After this interview, and it would appear on the same day, Mr. Carpenter wrote the plaintiff, saying that he had written to the canal company about royalty on the rock pile; and then said:

"As I come to think the matter over while writing them, I conclude we must not sell any of it until we have an arrangement about the royalty, and have written them that we should not sell it until we have their consent; so you must not sell any of it until we have their consent."

On the twenty-second of April, Mr. Foster wrote Mr. Carpenter that—

"The Iron River Furnace Company wish some of the rock at once. Can I begin shipping them five cars a day? Please advise by telegram on receipt of this, and write by mail."

Mr. Carpenter sent a telegram to Foster saying the superintendent of the company, Moore, might comply with the request, and also wrote him to the same effect on the twenty-third. The plaintiff then says Mr. Moore loaded five cars next day, and, the day after, Carpenter came to the mine, and witness requested Carpenter to allow him to load his own cars, and the request was acceded to, and he then with his own men loaded the remainder of 72 cars. Explanatory of this, however, is the following letter, written by Mr. Foster on the twenty-fourth of April:

"*Dear Sir:* Yours of the twenty-third is at hand. Your telegram received last night, and this morning I requested Mr. Moore to load five cars per day until further notice, and he said he would. The price I named to them was $1.50 on cars here, expecting the royalty to be not over 15 cents. You did not state whether you had heard from the canal company or not. I would prefer to do the loading myself, as it will require considerable attention, and I have requested Mr.

Digitized by Google

Lindsley to put in another track, so as not to interfere with your work. Please advise by return mail."

And on the first day of May Mr. Carpenter wrote Mr. Foster as follows:

"*Dear Sir:* On the twenty-third ult. I accepted of Charles Himrod & Co., of this city, an order to deliver to the Iron River Furnace Co. 500 tons of the rock from the pile at the Ludington mine, not knowing at that time what the price was that you had named to them. When I saw you, you told me the price was $1.50, and, as you had previously said you thought the rock would run about 40 per cent. iron, this price was satisfactory; but, from analysis that we have since made, we think the rock will run about 50 per cent. iron, and will sell no more of it until we have had further tests as to this fact; and I will say, further, that my arrangement with you as to the part of the money for which the rock should sell that you were to have was based upon the supposition that the rock would only run about 40 per cent. iron, and was only worth say $1.50 a ton; but, if it is worth say $2.50 a ton, then I do not think you should or would expect so great a proportion of the results of the sales as we talked about."

This was responded to on May 3 by Mr. Foster as follows:

"*Dear Sir:* Yours of May 1 at hand, and I assure you I am surprised at its contents. I was not aware that Himrod & Co., of Chicago, were purchasing agents for the Iron River Furnace Company; and on what grounds you would sell to them, after having sold the pile to me, I am at a loss to know. Your letters say that I can have it at 25 cents per ton, and half the profits above that amount; and your instructions to Mr. Moore, when you were here April 25, were in accordance with your letters to me. I do not see how I can stop shipments after having made sale. I expect to be in Chicago this week, and will call on you."

On the fifth of May, Mr. Carpenter answered, saying that he had written Moore to ship up to 500 tons, and no more until further ordered by him; and also wrote Foster on the same day, further:

"I shall be pleased to see you, and talk over the matter of

Digitized by Google

the rock pile, and will say that we propose to treat you fairly in the matter; but must emphatically deny your claim in the letter that we have sold you the rock pile, or any part of it."

The plaintiff also testified that, after the 500 tons were loaded, he was stopped from loading more by the superintendent, and that the lean ore in the rock pile at that time was worth on the cars $2.25 per ton. The declaration was for the value of the rock pile. The record contains all the testimony in the case.

On the part of the plaintiff were sworn, besides himself, Mr. Jones, who had an interest in the pile with the plaintiff, and O. Burlingame, a surveyor and engineer, who testified that the pile by his measurement and estimate contained 173,344 cubic feet, including the 500 tons taken out.

On the part of the defendant were sworn Mr. Stockbridge, Mr. Carpenter, and Mr. Moore; they being the manager, president, and superintendent of the defendant company.

Under the charge of the court, the cause was submitted to the jury, who returned a verdict for the plaintiff for the sum of $7,893.93. The defendant brings the case to this Court for review.

Mr. Foster further, on his cross-examination, testified, in relation to the contract as he claimed it, that the 25 cents per ton, and the one-half of the net sales, was to be paid to the defendant when he received the money from the parties he sold the ore to; that nothing was said in the bargain as to what was to be done in case he could not sell the rest of the ore; that there was no time set within which he was to take the ore away, but the understanding was he was to take it away as he could sell it. Payments were to be made when the ore was sold, at the time of the sale, and collection from the parties sold to,—"at the time the bill was due to the party to whom I sold." Witness further said:

"There was nothing said between me and Carpenter as to

Digitized by Google

the time of payment; that is the construction I put upon it myself. It was to be paid out of the proceeds of sales."

The firm purchasing the 500 tons sold failed, and nothing seems to have been realized thereon by either party. Foster never sold, so far as appears, or bargained for the sale, of any ore except the 500 tons, and never paid or offered to pay the defendant for any of it. Nor does it appear that he ever demanded or asked to be allowed to take any more away, except when he told Mr. Carpenter, sometime in the summer, that he could sell the rest of the pile at $2.25 if Mr. Carpenter would guarantee it to yield 50 to 55 per cent. iron, which he declined to do.

Upon the subject of possession under the agreement as claimed by the plaintiff, he says:

"As I understand it, I took possession by hiring the men, loading the ore, and shipping it away. That is the only possession."

It appears, also, from his testimony, that the first five cars were loaded by the defendant's men, under the care of Superintendent Moore; and that, at the request of Foster, Carpenter allowed him to procure the men, and load the remaining cars of the 72, because he wished to take charge of the sorting of the ore, and thought he could load the cars the cheapest.

Fifteen errors are assigned upon the record. Two of them, the first and second, relate to the rulings of the court in admitting testimony, and are not discussed by appellant, and are therefore not considered here.

The remaining assignments of error relate to the charge, and the refusals of the court to charge as requested by defendant's counsel. Six of these requests are of first importance. They require a careful examination of all the testimony in the case, and have been the occasion of the extended reference made thereto in this opinion. These requests are as follows:

Digitized by Google

"1. If the purchase price to be paid depended on the price Foster should get for the ore, on sales to be made by him, it was not a sale, and the plaintiff cannot recover."

"2. There is no evidence of any intention of the parties that the title should pass before the rock should be sorted and delivered in cars, and therefore it must be held that the title did not pass to the plaintiff, and he cannot recover."

"3. There is no evidence of any unlawful conversion of the rock pile, or any part of it, by the defendant, and the plaintiff cannot recover."

"4. There is no evidence of such delivery and acceptance as is necessary to make an oral sale valid, and therefore your verdict must be for the defendant."

"5. There being no contract or memorandum in writing for the sale of that rock pile, there was no valid sale, unless the plaintiff accepted and received part of the goods sold, or gave something in earnest to bind the bargain, or in part payment."

"6. The contract as testified to by the plaintiff was not a contract of sale, and did not pass the title to Foster. The rock never became his property, and he cannot recover."

It will be noticed that each of these requests substantially asks the court to direct a verdict for the defendant. As applied to the facts in this case undisputed, I think either or all of these requests might have been properly given.

It is claimed by both parties that the undivided half of the net proceeds, added to the 25 cents the ore was worth to the defendant for filling, was the amount the defendant was to receive on sales made by the plaintiff. The amount the defendant was to receive for its ore depended, therefore, entirely upon the price at which it could be sold, and the amount that might be collected on the sales made, and both in turn depended upon the ability of the plaintiff to make a sale of the ore at all.

Almost any kind of a contract relating to personal property may be made by the owner, but, when it is intended to pass the title to the property by the contract, there are elements of certainty required in its terms, to give it any validity. The price to be paid by the purchaser should be fixed, and, if

Digitized by Google

the sale is not to be for cash, the terms of payment must be stated, and the time given within which the price fixed must be paid. *Williamson v. Berry*, 8 How. 544. Unless this is done, the title to the property will not pass, without a clause in the contract whereby they are waived, and nothing of that kind appears in the agreement relied upon in this case. Under it, both the time of payment and the price to be paid are left entirely uncertain, and upon these depended the change of title.

In regard to the second request, I think it is clear, upon all the testimony, that the delivery was to be made upon the cars after the lean ore had been separated from that which was worthless, and of which there was a large quantity,—from 5 to 15 tons in every 500. I find no evidence properly in the case tending to show that the title should pass to any person, except as the ore was delivered upon the cars by the defendant; and it was only delivered there for parties to whom the plaintiff had made sales. It was only the ore which the plaintiff desired to handle, whatever the character of the arrangement was with the defendant, and he could not do this until it was sorted out of the pile of rock, and the latter excluded. It was not susceptible of delivery, until this was done, for any purpose for which it could be used; and without actual delivery, or that which was equivalent to it, and which does not appear in this case, no title could pass to the plaintiff.

It must be recollected, it is an executed contract alone which is necessary to make the plaintiff's case, as he states it in his declaration; at least, so far as the title to the property is concerned.

I am satisfied of the correctness of the third request, upon the undisputed testimony. So long as the plaintiff had neither the possession, nor the right to it, the defendant could not be guilty. There is no question but that the defendant is the owner, and entitled to the possession, of the

Digitized by Google

ore, if the plaintiff is not. It appears without controversy that the rock pile was much richer than either of the parties supposed it to be when the arrangement, such as it was, was made. And not only the defendant, but the owner of the land upon which the mine was located, in making claims for its royalty, were entitled to the benefit of the highest price the ore would bring, depending upon its richness; and the plaintiff had no right, under his claimed contract, to sell for less than $1.50 per ton, and I am sure no construction consistent with fair dealing and honesty could fail to give the defendant its proper share of the profits arising from the unexpectedly developed richness of the ore; and, if this is so, its interest would permit it to refuse to deliver the ore, on the request of the plaintiff, until such newly-discovered interest of the defendant was properly protected; and it was only to secure this that defendant refused to comply with plaintiff's requests, notwithstanding the refusal rested upon more impregnable grounds.

The fourth and fifth requests may be properly considered together. The only facts upon which a delivery is claimed is that the defendant allowed the plaintiff to load a part of the cars containing the 500 tons, and for which neither party has ever yet received a penny, and to the purchaser of which the plaintiff wished to deliver more ore at $1.50 per ton, and which was worth $2.20 per ton, when the defendant refused to deliver any more. The reason the plaintiff gave for his wishing to load the cars was not that he owned the property to be loaded, but that he could see to the sorting better, and do it cheaper. The very reasons the plaintiff urges why he should be held to be the owner and possessed of the property are acts and statements of the plaintiff tending strongly to show to the contrary, and preclude all idea of a delivery to the plaintiff. The whole conduct of the defendant, and the object it had in view in acceding to the plaintiff's wishes in allowing him to load the cars, show very clearly that its pur-

Digitized by Google

pose was not to make delivery of the oar to the plaintiff, but to enable him better and easier to perform the duties devolving on him in making sale, and assorting the ore preparatory to delivering to the purchaser.

In regard to the fifth request, it appears from the record that nothing was ever given by the plaintiff to the defendant, on the claimed sale of the rock pile, and that no portion of the agreement was ever reduced to writing and signed by either of the parties. And the testimony is not disputed that the contract, whatever it was, was made to be used in Michigan, between parties resident in Michigan, relating to property in Michigan, which was to be selected, weighed, and delivered in Michigan. It was to be performed here; and I have not yet been able to discover why this contract, which is made the basis of this suit, is not within the statute of frauds. In construing it, it is of no consequence where the defendant's agents or servants reside.

The sixth request may be said to include all the rest, and the consideration given to the others necessarily disposes of this. The request should have been granted.

Several errors assigned remain unnoticed which it would not be difficult to sustain, but there is no occasion for considering the case at further length.

The judgment must be reversed, and a new trial granted.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

EPHRAIM BALDWIN, SURVIVOR OF BALDWIN & WING, v. DANIEL CLOCK.

Action by attorney for services—Disparaging remarks of court—Payment—Evidence.

1. In a suit by an attorney for professional services, the trial judge goes beyond his province in referring disparagingly to the plaintiff, or the value of his services.
2. Payment is a matter of defense to be shown by the defendant in some way, when plaintiff has made out his case.
3. In a suit for services testified to have been rendered by plaintiff a year after the date of a receipt for the payment for a specific service rendered, the jury are not authorized to consider such receipt as covering the later account.

Error to Monroe. (Morris, J.) Submitted on briefs October 21, 1887. Decided January 19, 1888.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Willis Baldwin, for appellant.

Elam Willard, for defendant.

CAMPBELL, J. Plaintiff, as survivor of the law firm of himself and Anderson Wing, practicing in Monroe, sued defendant for legal services rendered in connection with defendant's claim against a railway company for damaging his land in Toledo, Ohio. Plaintiff recovered $40, the amount of his claim for firm services, but did not recover the sum of $25 claimed for the value of retaining Warner Wing as counsel. Defendant appealed, and in the circuit the plaintiff recovered nothing, and assigns errors for misdirection of the circuit judge.

Plaintiff made out by his own testimony a full case show-

Digitized by Google

ing his own services and Judge Wing's, with the assent and concurrence of the defendant to all the employment. One purpose of the employment was to procure an injunction against the alleged wrongful encroachments of the railroad. Plaintiff showed that he was employed four days, and Judge Wing two days, in looking up and consulting on the matter, and had prepared the material and authorities for procuring the injunction.

Defendant produced a receipt signed in the firm name by Anderson Wing, plaintiff's deceased partner, in these words:

"Received of Daniel Clock six dollars, payment in full for trip to Toledo."

This was dated June 18, 1872. This was a year before the services referred to by plaintiff in his testimony.

Defendant also produced a letter written in 1874 by Baldwin & Wing inclosing an account charging the services in 1873 at a larger sum than that recovered before the justice, but within the amount testified to by plaintiff.

Defendant also introduced testimony tending to show that plaintiff wished to look at the premises, and offered to go down to Toledo for $5, which was paid him. He also said that he did not wish Judge Warner Wing employed as counsel, and when he learned of such employment he dismissed plaintiff, and employed Mr. Kent, of Toledo.

He also produced a witness who, without giving time or identity of claim, swore that Anderson Wing said to him in a saloon that the account mentioned in the receipt was paid in full.

Plaintiff testified that the receipt was merely for the expense of a visit to Toledo.

Errors are assigned upon some disparaging remarks of the judge, and the admission of a piece of testimony, which is itself omitted from the record. But as there was a more vital mistake made on the merits, these need not be

Digitized by Google

considered, although, if the judge referred to plaintiff and the value of his services, he went beyond his province.

The court charged that the plaintiff must not only prove his claim, but that it was not paid. And it was further charged that the receipt goes for what it reads, except as explained or modified by the acts or remarks of the parties, and referred to the receipt in connection with what was said by Anderson Wing, as what might, if believed, show a settlement in full.

Nothing is plainer than that payment is a matter of defense to be shown by defendant in some way, when plaintiff has made out his own case. And so far as the receipt goes, it does not purport to cover anything but a trip to Toledo; and the very loose talk of the witness about Anderson Wing's admissions goes no further. There was nothing to authorize the jury to consider this receipt or Wing's statement to cover the principal part of the account, and the only matters which plaintiff claimed in his testimony.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Digitized by Google

68 204
98 170

68 204
122 490

68 204
136 277

HAZEN S. PINGREE ET AL. v. WILLIAM C. STEERE.

Replevin—Description of property.

Where the plaintiffs in replevin were entitled, as mortgagees, to the possession of an *entire* stock of boots and shoes, a description of the property to be replevied as "sufficient of said stock [fully locating the same] to satisfy the claim of the plaintiffs, as mortgagees of said goods, amounting to $805," is sufficient.

Error to Montcalm. (Smith, J.) Argued October 26, 1887. Decided January 19, 1888.

Replevin. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Isaac Marston, for appellants.

George S. Steere, for defendant.

CHAMPLIN, J. A writ of replevin described the property to be replevied as follows:

"Sufficient of the boots and shoes now in the store or building situate on lot 182 of Moore's plat of the village of Edmore, Montcalm county, Michigan, and now occupied by defendant herein, to satisfy the claim of the plaintiffs herein, as mortgagees of said goods, amounting to eight hundred and five dollars."

The sheriff replevied a quantity of boots and shoes, caused an inventory and appraisal thereof to be made, and summoned the defendant, who entered a general appearance, by his attorney. The plaintiffs' attorney filed his declaration, and defendant's attorney then moved to quash the writ, for the reason that the writ did not sufficiently describe the property to be replevied; and the court, upon this ground, quashed the writ.

Digitized by Google

In *Farwell v. Fox*, 18 Mich. 166, the writ described the property as "six oxen," and it was held to be sufficient.

In *Kelso v. Saxton*, 40 Mich. 666, it was held that property described in the writ as "one cow, seven years old, color red and white," and "two yearlings, red and white in color," was good.

In *Sexton v. McDowd*, 38 Mich. 148, it was held that the description need not be so explicit and exclusive as to supersede recourse to extrinsic help; if, with such aid as the plaintiff usually affords, the officer can identify the property, it is sufficient; citing *Farwell v. Fox, supra.*

"Indeed," said the Court, "it may be laid down that in the great majority of cases the designation in the writ must be supplemented by other means of identification, and the officer must use his intelligence in ascertaining assisting facts and in applying the description to the property intended."

In *Wattles v. Dubois*, 67 Mich. 313 (34 N. W. Rep. 672), the writ described the property as—

"Two hundred and fifty bushels of wheat of the Fultz variety, raised and grown upon the farm of plaintiff, on section 7, in township of Portage, Kalamazoo county, Michigan."

We held the description sufficient.

It appears that the plaintiffs were entitled to the possession of the whole stock, under their mortgage, and it is not perceived how the defendant is harmed by replevying from him less than the plaintiffs were entitled to. And, if the plaintiffs were entitled to replevin the entire stock, there could be no difficulty in executing the writ by taking sufficient to satisfy the plaintiffs' claim from the stock mortgaged.

The judgment must be reversed, and the order setting aside and quashing the writ vacated, and the defendant will have leave to plead to the declaration.

MORSE, J., concurred with CHAMPLIN, J.

SHERWOOD, C. J. (*dissenting*). I think the decision of

Digitized by Google

the circuit court upon the motion to dismiss the writ was right.

The statute requires that the writ shall describe the property to be replevied. The description is of first importance, and, if not given in the writ, the court has no jurisdiction. How. Stat. § 8320; *Denison v. Smith*, 33 Mich 155; *Wilson v. Arnold*, 5 Id. 98; *Stevens v. Osman*, 1 Id. 92; *Farwell v. Fox*, 18 Id. 166; *Paterson v. Parsell*, 38 Il. 607; *Snedeker v. Quick*, 11 N. J. Law, 179; *Davis v. Easley*, 13 Ill. 192; *Root v. Woodruff*, 6 Hill, 418; *Stanchfield v. Palmer*, 4 Greene, 25.

The kind of property to which that sought to be taken under this writ belongs is mentioned, and the amount desired to be recovered in value is stated; and this is all there is of the description of the property contained in the writ. The particular description of the goods which the officer should take is not mentioned in the process. It is boots and shoes the plaintiffs desire the possession of; but the number or kind of both, or of either, is not stated. This, however, is what the statute requires.

It is true, this Court has held in one case that "six oxen" was a sufficient description, and in another, that "one cow, red and white," was sufficient; but this Court, nor any other, that I have been able to ascertain, has ever held that a thousand dollars' worth of cows, or sheep, or oxen, would be a sufficient description of the property, under a statute like ours, and which would be a case really like the present.

The officer has nothing to do with the value of the property mentioned in the writ. The Legislature have not invested him with the judicial power of determining the value, for any purpose, of the property mentioned in the writ of replevin; and yet, in deciding the amount of property he is required to take under this writ, the only limitation placed upon his action as to the amount he should take is to be determined by the value he shall place upon the same.

Digitized by Google

This simply converts the writ of replevin, in force and effect, into an execution against the property of the defendant, and allows the property of the debtor to be seized and turned over to the creditor before any trial has been had, or the indebtedness or liability of the defendant has been legally ascertained. His property has been seized and taken from him and given over to another irrevocably, upon the mere claim of the plaintiff, without trial or condemnation. This is against the spirit of the statute, and should not be allowed.

It is thought by my brethren that the reference in the writ to a mortgage to the plaintiffs has something to do in aiding the otherwise defective writ. It is difficult to see how this could aid the defective description, so long as the description contained in the mortgage is not given, nor the fact stated that the mortgage contains a description of the property, or that the mortgage was in existence at the time the writ issued.

It is the exercise of extraordinary power when the Legislature allows the property of one person to be taken, and its possession transferred to another, before any liability of the one to the other has been established by due process of law; and, when it is thus allowed, all the safeguards which the law and the courts have secured to the debtor should not only be regarded, but rigidly observed, both in the letter and spirit of the statute.

I think Judge Smith's decision in this matter did no more than this, and should be affirmed.

CAMPBELL, J., did not sit.

Digitized by Google

HARPLE M. HARROUN v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Practice in circuit courts—Taking memoranda or statements of counsel to jury-room—Error without prejudice.

1. *Memoranda* or statements made by counsel should not be given to the jury, to be used by them in the jury-room, unless by consent of the attorney of the opposite party. The only exception to this rule exists in cases involving the investigation of long accounts, where numerous items are to be passed upon, when, if there are no bills of particulars, it might be proper, in the discretion of the trial judge, to allow the jury to take to the jury-room lists of the items claimed on *both* sides.[1]
2. Where, in a suit for the value of stock killed by a railway company, testimony was received on *both* sides tending to show the value of the animals killed, and the damage to those injured, and the jury were permitted to take to the jury-room a statement made by the plaintiff's counsel showing the highest amounts given by any witness of such value and damage, and the jury rendered a verdict for *less* than the *average* of such amounts, with interest, the use by the jury of such statements was error without prejudice.
3. The case of *Millar v. Cuddy*, 43 Mich. 274, is qualified in so far as it conflicts with the doctrine laid down in head-note 1.

Error to Newaygo. (Fuller, J.) Argued November 4, 1887. Decided January 19, 1888.

Case for damage to stock by railway company. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

Stone & Hyde, for plaintiff.

MORSE, J. The plaintiff sued the defendant in the circuit court for the county of Newaygo, for the value of an

[1] See *Bethel v. Linn*, 63 Mich. 465 (head-note 3); *Bulen v. Granger*, Id. 312 (head-note 5).

Digitized by Google

ox, a horse, and a mule killed by the cars of the defendant, and a horse and a mule injured and damaged by defendant's train.

Testimony was offered and received on both sides showing the value of the animals killed, and the damage to those injured.

At the close of the charge of the court to the jury, one of the attorneys of the plaintiff said:

"Here is a statement of what we claim, that I would like to have the jury have." Defendant's counsel objected.

The Court. "If the jury desire it they can take it; it is merely a memorandum of the highest amounts given by any witness."

Defendant's Counsel. "I do not think it ought to go to the jury."

The Court. "I will allow defendant's counsel to make a statement of the lowest amount sworn to by any witness."

Defendant's Counsel. "I don't think my position on that question would warrant me in doing that."

The Court. "The instructions given to the jury will prevent the paper doing any hurt."

Defendant's Counsel. "Here are several animals, and if it will aid the jury they can write down the names of each, but the values or extent of the injury I think is for the jury."

The Court. "I don't think we will prolong this discussion. If the jury want this paper they can have it; otherwise not."

The jury thereupon took the paper. Defendant's counsel excepted to the ruling of the court permitting the jury to take this statement. This is the only error assigned upon the record.

The jury were authorized by the court to compute interest upon the amount of the injury from the time the animals were killed or injured up to the date of their verdict. They found for the plaintiff in the sum of $621.

Quite a large number of witnesses were sworn upon the part of each party as to the damages; and, in order to ascertain whether any harm was done to the defendant by this

Digitized by Google

ruling of the court below, I have carefully examined the testimony of each witness upon this branch of the case. Upon such examination I find that the plaintiff's own testimony fixed his loss, without interest, at about $555, while an average of the evidence in his behalf, including his own, would be, without interest, about $605.

The testimony on the part of the defendant averages the value of the animals killed at about $250, while there is no *data* of its witnesses from which to estimate the damage on account of the horse and mule injured, but not killed.

The jury were entitled, if they saw fit, to take the highest or lowest estimate of damages, or the testimony of any one witness as to the loss on each animal. The stock was killed and injured in the fall of 1886,—the ox on the fifteenth of October, and the others on the twenty-eighth of the same month. The verdict was rendered on the twenty-fifth day of July, 1887. Interest was therefore allowable for about 9 months at 7 per cent. The jury, therefore, it is evident, found the value a little less than the average of the witnesses for the plaintiff.

We are satisfied that the statement did not prejudice the defendant's case.

I do not think there was any error in allowing the jury to take this *memoranda*. It came clearly within the opinion of this Court in *Millar v. Cuddy*, 43 Mich. 274 (5 N. W. Rep. 316).

But my brothers are of the opinion that it was error; they do not understand the practice to be as laid down in that opinion. Nor do they deem such practice correct or desirable. They hold that the principle upon which jury trials proceed is that the jury shall render a verdict upon their own unaided views of what the testimony is; and, after they leave the jury-box to deliberate upon their verdict, no communication shall be made to them, orally or otherwise, by counsel in the case. If they may take a written statement

Digitized by Google

from counsel of their claim, there is no good reason why they may not take a written argument in support of such claim. When the law is that no communication, orally or otherwise, shall be made to them, the jury cannot be justified in taking from one of the parties a communication, which, in effect, repeats to them continually:

"This is my claim; here are the figures; I ask your verdict for this amount."

Such communication is intended to influence the minds of the jury; otherwise it would be idle to give it to them. In many cases it does influence them. It is no answer to say that a jury may take *memoranda* of the testimony to aid their memory, during the trial, and carry the same with them to the jury-room when they retire to consult upon their verdict. This is proper enough; but it does not follow that a party to the cause, or his counsel, who is interested in the result, may hand to the jury *memoranda* to aid or refresh their memory.

The true rule should be, so my brothers hold, that *memoranda* or statements made by counsel shall not be given to the jury, unless by consent of the attorney of the opposite party, to be used by them in the jury-room. The only exception to this rule exists in cases involving the investigation of long accounts, where numerous items are to be passed upon. In such cases, if there are no bills of particulars, it might be proper, in the discretion of the trial judge, to allow the jury to take to the jury-room lists of the items claimed on both sides.

We are all agreed, however, that there was no harmful error in this case, and that the circuit judge was justified in his ruling, under the decision in *Millar v. Cuddy*.

As this is a matter of practice which ought to be settled, I join with the balance of the Court in declaring the rule to be as they hold, and in qualifying the case of *Millar v.*

Digitized by Google

Cuddy, in so far as it conflicts with the doctrine here established.

The judgment of the court below is affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL, J., did not sit.

SOPHRONIA POTTER v. GEORGE E. SMITH ET AL.

68 212
f148 434

Parol gift of land—Equity—Protection of title of donee—Rights of subsequent execution creditors and incumbrancers of donor.

The title of a daughter to land donated to her by her father by *parol*, of which she took immediate possession and held adversely for more than 20 years, making improvements upon the premises and claiming the same as her own, will be protected in equity as against his subsequent grantees and execution creditors, but *not* as against a subsequent mortgage given by him, of which she had full knowledge, as also of its foreclosure and the sale of the land thereunder, and entered into negotiations for its redemption therefrom, and made no claim to the mortgagees of the invalidity of their security as against her occupancy or title.

Appeal from Berrien. (Smith, J.) Argued January 4, 1888. Decided January 19, 1888.

Bill to quiet title. Complainant and defendants appeal. Decree reversed, and new one entered decreeing the title to be in complainant, subject to a mortgage, etc. The facts are stated in the opinion.

Clapp & Bridgman, for complainant.

Edward Bacon, for defendants.

MORSE, J. The complainant files her bill to quiet her title to lots 300, 301, and 302, in the village of St. Joseph. She

Digitized by Google

claims that her father, Benjamin C. Hoyt, made a gift in parol of these lots to her in the year 1859, and that she moved into the dwelling-house upon one of them, and has resided there ever since with her husband and family, claiming and holding the same adversely against all the world, the three lots being inclosed by one fence.

The proofs show that, under some arrangement with her father, she did move into the house, and take possession of the premises, sometime in the year 1859, and that she has lived there ever since, claiming the same as her own, at least ever since the year 1874. The bill of complaint was filed July 20, 1882.

The character of her occupancy of the premises prior to 1874 is not as definitely and satisfactorily established as we could wish. The testimony of Benjamin C. Hoyt, her father, was not taken, although he is now living at Aberdeen, Mississippi. The complainant testifies that her father called at her house, and asked her and her husband to go up and look at the place.

"He said, if I liked it, I might have it for a home; if I liked it, I might move into it, and have it for a home."

When she asked him afterwards for a deed, her father said she should have it sometime, but that it was better as it was then, as she might sell it and be without a home. Her husband, F. A. Potter, corroborates her as to the gift.

But it appears that on the fifth day of July, 1859, Benjamin C. Hoyt borrowed $500 of Daniel N. Hoyt and George N. Griffin, his brother and brother-in-law, and gave his note therefor. He secured this note by a mortgage of the same date upon lots 300 and 301.

The giving and existence of this mortgage was ascertained soon after by both complainant and her husband, and no steps were ever taken, previous to the filing of the bill of complaint in this cause, by either of them, in disaffirmance of said

Digitized by Google

mortgage. The interest upon the mortgage was paid by Hoyt or some one up to November 5, 1872. F. A. Potter testifies that when he learned of the mortgage he spoke to Mr. Hoyt about it. Hoyt said to Potter that he only borrowed the money for a short time; that he did not put the mortgage on any of his lots, because they were for sale, and it might interfere with the sale of them; and that Potter need give himself "no uneasiness about the mortgage, as he should remove it soon anyway."

This mortgage was foreclosed by advertisement by Hoyt and Griffin, the premises sold, and bid in by them, and a sheriff's deed upon such sale issued to them, August 11, 1874.

After such foreclosure and sale, and before the redemption expired, negotiations were entered into between the complainant by her husband, and his brothers, who were acting as her attorneys, and Mr. Griffin, looking towards the payment of the mortgage by complainant, and the deeding of the premises to her by quitclaim on the part of the mortgagees. These negotiations were not concluded; but at no time while they were going on did complainant, or any one acting in her behalf, intimate that the mortgage was not a valid lien upon the premises.

In 1873, Benjamin C. Hoyt failed. About this time he executed a deed of assignment of his property, for the benefit of his creditors, to one Lyman Collins. In this deed he mentioned and conveyed the three lots in controversy here. The deed bore date November 28, 1873.

March 24, 1869, Hoyt conveyed lot No. 300 to his son, Enoch C. Hoyt. This deed was found among Enoch's papers after his death, and then recorded on the third day of March, 1874.

June 1, 1874, Benjamin C. Hoyt was adjudicated a bankrupt in the United States court, and Joseph W. Brower appointed his assignee. Such assignee has never been discharged.

Digitized by Google

July 23, 1874, Benjamin C. Hoyt, then residing in Aberdeen, Mississippi, executed a quitclaim deed of these lots to the complainant; said deed reciting that he did on or about the tenth day of April, 1858, make to said complainant a parol gift of the said lots; and that she did, immediately upon the making of such parol gift, take possession of said premises, and has since then occupied the same uninterruptedly, adversely, and exclusively as her own property. Therefore, in confirmation of said parol gift, and in consideration of one dollar, the quitclaim is executed.

In March, 1882, for a valuable consideration, Griffin and Daniel N. Hoyt assigned the mortgage to George E. Smith, and also conveyed the premises to him by a quitclaim deed. Before this time, and in 1876, Hoyt and Griffin commenced an ejectment suit to recover possession of the premises. February 1, 1879, a verdict and judgment was rendered in favor of defendant upon the sole ground that the foreclosure was void because of the sale of the two lots in one parcel. No motion has ever been made in the suit for a new trial.

George E. Smith is made a defendant in the present suit, because of his ownership of the mortgage, and his possession of the quitclaim deed from Hoyt and Griffin. He also claims title under execution sales growing out of attachment levies upon the premises, as the property of Benjamin C. Hoyt, in October, 1873.

Brewer is a defendant, as assignee in bankruptcy of Hoyt. Susan V. Hoyt is the widow, and Grace Hoyt is the daughter and sole heir, of Enoch C. Hoyt. Chapman claims title under an attachment againt Benjamin C. Hoyt.

The circuit court for the county of Berrien, in chancery, dismissed the complainant's bill as to lots Nos. 300 and 302, and decreed that she had no title to them. It further decreed that, in law and equity, she was the owner of lot 301, upon which the dwelling-house is situated; and that the

Digitized by Google

defendants Smith, Brewer, and Chapman, should release and quitclaim said lot to her.

We think the decree cannot be sustained. Both parties appeal to this Court. We are disposed to find that complainant's father made the gift of these lots to her as claimed. She entered into possesion of them April 10, 1859, and made various improvements upon them in reliance upon such gift. She has ever since that time claimed the premises as her own, and held adverse possession, as against every claim except this mortgage. She is entitled to all three of the lots, as against all the defendants except Smith, and against him excepting as to his mortgage lien.

We think lots 300 and 301 must be held as subject to the lien of the mortgage to Hoyt and Griffin, and now held by Smith. She knew of the same being executed by her father, while the title stood in his name, and took no steps to acquaint the mortgagees with any claim of its invalidity, as against her occupancy or title to the premises. She and her husband, acting as her agent, not only acquiesced in but recognized this mortgage as an existing and valid lien upon the premises. It is too late now for her to impeach or disclaim it.

The decree of the court below will be reversed, and a new decree entered here declaring and decreeing the title in fee of all the lots in the complainant. She must pay, or cause to be paid, to the defendant Smith the amount due upon the note and mortgage, on or before the fifteenth day of July, 1888, or, in case of default in such payment, the lots 300 and 301 may be sold by any circuit court commissioner of said county of Berrien in like manner, and with the same effect, as is usual in foreclosure of mortgages in chancery,—lot 300 to be first sold,—for the purpose of paying from the proceeds of such sale the sum due upon said mortgage. The defendants, except Smith, must release and quitclaim to said complainant their claim of title to any or all of said lots within

Digitized by Google

thirty days from the entry of final decree in this Court, or such decree shall operate as such conveyance. Smith must also release all claim of title save his mortgage interest.

The complainant will recover costs of both courts of the defendants, excepting Smith, who must be given costs of both courts against complainant.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

---

68 217
89 315
68 217
97 224
97 501
68 217
158 347

JOHN V. PHILLIPS v. THE TOWNSHIP OF NEW BUFFALO.

Statutes—Construction—Prospective operation—Extension of time for collection of taxes.

1. It is a sound rule of construction that legislation is to have a prospective operation only, except where the contrary intent is expressly declared, or is necessarily to be implied from the terms employed.
2. Act No. 8, Laws of 1885, extending the time for the collection of taxes, did not revive a tax warrant which had expired by its own limitation prior to said act taking effect.

Error to Berrien. (Smith, J.) Argued January 4, 1888. Decided January 19, 1888.

Assumpsit to recover tax paid under protest. Defendant brings error. Affirmed. The facts are stated in the opinion.

Van Riper & Worthington, for appellant.

Clapp & Bridgman, for defendant.

LONG, J. This is an action of assumpsit, brought in the circuit court for the county of Berrien, to recover a tax paid

Digitized by Google

by plaintiff, under protest, to the treasurer of the township of New Buffalo.

It appeared upon the trial of the cause that one Irving Paddock, treasurer of said township, had in his hands the tax roll of said township for the year 1884, with proper warrant indorsed thereon, for the collection of the taxes thereon assessed. Appearing upon such roll was the following tax, assessed against the plaintiff: For State taxes, $1.54; for county taxes, $2.92; for township taxes, $1.99; for highway taxes, $1.54; for school taxes, $17.55; for judgment taxes, $22.23; for collection fees, $1.90; for making levy, $1.25,—total, $50.92.

No proceedings were taken to collect such tax till the twenty-first day of February, 1885, at which time, the plaintiff refusing to pay the same, the treasurer of the township levied upon personal property of the plaintiff, who, for the purpose of relieving his property from such levy, paid the amount demanded under protest, one portion of which protest is as follows:

"That the extension of time for the collection of taxes, from and after the first day of February, 1885, was not granted by any legal action of the township board thereon, and no evidence of such extension appears on the warrant to said roll, and it does not appear from the records of the township that any extension was ever applied for by the treasurer for the collection of any part of the taxes of the said township."

It was conceded, on the trial of the cause, by defendant, that no valid extension of time for collection of taxes in said township was granted by the township board, and that the time limited in the warrant for such collection was February 1, 1885; but defendant claimed that the time was extended, and the warrant annexed to said roll was revived and given force, by Act No. 8, Laws of 1885. The court held that said act did not operate to extend the time for the collection of the tax, and directed a verdict for the plaintiff

Digitized by Google

for the tax so paid, and defendant brings error. This presents the only question in the case.

At the time the plaintiff paid the tax, February 21, 1885, the warrant attached to the roll in the hands of the treasurer had expired, and Act No. 8, Laws of 1885, which came in force February 26, 1885, did not revive it, or give it any force whatever. The purpose of the Legislature was simply to extend the time of the warrants which were then in force, in all except certain specified counties in the State, and the time for the collection of taxes thereon, to March 25, 1885. Nothing in the title, nor in the act itself, indicates anything more. It reads—

"That the time limited for the collection of taxes * * * be and the same is hereby extended until the twenty-fifth day of March, 1885."

It is a sound rule of construction that legislation is to have a prospective operation only, except where the contrary intent is expressly declared, or is necessarily to be implied from the terms employed. *Harrison v. Metz*, 17 Mich. 377; *Smith v. Auditor General*, 20 Id. 405; *Auditor General v. Monroe*, 36 Id. 75; *Finn v. Haynes*, 37 Id. 65; Cooley, Const. Lim. 370; *Daniells v. Watertown Tp.*, 61 Mich. 514 (28 N. W. Rep. 673).

In the present case, the time limited in the warrant for the collection of the tax had expired at the time the treasurer seized the plaintiff's property. The plaintiff paid the tax under protest, and his right to recover the amount paid at once vested. This act, passed five days after this, could not divest him of this right.

The court properly directed a verdict for plaintiff. The judgment of the court below is therefore affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

JUNIUS H. HATCH ET AL. v. THE COMMON COUNCIL OF THE VILLAGE OF ST. JOSEPH ET AL.

Equity—Bill to quiet title—Grant of lands—Acceptance—Trust deed—Reversion—Statute of limitations—Laches.

1. Where a bill was filed to quiet the title to lands, and dismissed on general demurrer, prior to Act No. 260, Laws of 1887, taking effect, the Supreme Court may sustain the bill under said amendatory statute, if it states facts entitling the complainant to equitable relief and is properly filed as a bill to quiet title.
2. Where land is conveyed upon trusts, and the grantor absolutely divests himself of his title, without any power of revocation, and 30 years have elapsed, and the rights of third parties have intervened, a bill will not lie to revoke said deed for the alleged non-performance of said trusts.
3. The law presumes the acceptance of a beneficial grant by the grantee.
4. Statutes of limitation will be applied in equity where they would bar the claim at law.

   So *held*, where a bill was filed for a forfeiture of a deed for the non-performance of a condition subsequent more than 25 years after such alleged right accrued, during which time the complainants, and those under whom they claimed, had slept upon their rights.

Appeal from Berrien. (Smith, J.) Argued January 5, 1888. Decided January 19, 1888.

Bill to quiet title, etc. Decree sustaining a general demurrer, and dismissing bill, affirmed. The facts are stated in the opinion.

Edward Bacon, for complainants.

George S. Clapp, for defendants.

LONG, J. It appears that the bill in this case was filed to quiet the title of the complainants to certain lands in Berrien

Digitized by Google

county, to which they claimed to derive title under the last will of Junius H. Hatch, late of Buffalo, in the state of New York, bearing date of May, 1868, which was executed and tested as by law is required for passing real estate by devise, and in which complainants were nominated and appointed executors, and by which they were devised all the real and personal estate of the testator.

It is claimed by the bill that said Junius H. Hatch, deceased, on July 29, 1834, and in his life-time, was seized in fee-simple of four-tenths of all that part of the village of St. Joseph, in Berrien county, lying between Front and Vine and Water streets, which is painted or colored on the original plat, and designated as "side-hill;" also such lots in said village as are marked and designated in such original plat for an academy, for a court-house, a city-hall, a jail, market-house, and churches; also of lots numbered 488, 489, 490, 491, 492, and 493; and that the lots so marked were numbered as follows: Lot 383 for an academy; lot 237 for a court-house; lot 200 for a city hall; lot 274 for a jail; lots 229, 245, and 41 for markets; lots 313, 317, 376, 384, 394, and 399 for churches.

That on said July 29, 1834, Jonathan Hailman, Lucius Lyon, Tollman Wheeler, Calvin Britain, Jeremiah Price, Enoch Jones, Austin E. Wing, Charles Noble, Warner Wing, William McKaleb, and Lorain Marsh owned or had some interest in the rest and residue of said lands, but their exact interest or title complainants are unable to state.

That since the death of said Junius H. Hatch complainants have made search in the office of the register of deeds of Berrien county, and find therein recorded a trust deed in words following:

"Know all men by these presents that we, Enoch Jones and Sophronia I., his wife, Junius H. Hatch, William McKaleb, Lorain Marsh, Bacon Wheeler, and Delia M., his wife, Jonathan Hailman, Lucius Lyon, and Calvin Britain, Charles Noble and Eliza S., his wife, and Austin E. Wing and Harriet, his wife, being either original or present pro-

Digitized by Google

prietors of the village of St. Joseph, on the land upon which the said St. Joseph (formerly Newberry Port) was laid off, do hereby grant, bargain, and convey, and forever quitclaim unto the president, trustees, and freemen of the village of St. Joseph aforesaid, for the use and benefit of the corporation, all our right, title, claim, and interest in and to all that part of the said village lying between Front and Vine and Water streets which is painted or colored on the original plat, and designated as 'side-hill,' for and in consideration, and upon that condition only, that the same be and forever remain a public common, and not be converted to any other use; that the same shall be cleared, ornamented, and beautified for a public walk or promenade, so soon as the corporate authorities of said village shall deem it practicable to do so at their expense, but at all events within ten years; and that no part thereof shall be excavated or removed except for the purposes aforesaid, or for widening or improving the streets, or some part thereof. And also all our rights and title to such lots as are marked and designated in the said original plat for an academy, a court-house, a city hall, a jail, market-houses, and churches, to be by the said president, trustees, and freemen of the village of St. Joseph held in trust as follows, to wit: 237 and 274 for the county of Berrien, so long as the seat of justice for said county shall remain at St. Joseph,—lot No. 237 for a court-house, and lot 274 for a jail; lots 229, 41, 383, and 200 to be for the use of the said corporation, as severally designated on said plat. And such lots as are designated on said plat for churches are to be held in trust for and conveyed as follows, to wit: Such church as shall make the first selection shall be entitled to the first choice, each denomination one lot, for the use of such church, and conveyance to be made by said corporation so soon as a church be erected thereon and fit for use, and which shall be deemed by the corporation to be worth two thousand dollars or more. And the conveyances hereby made to the president, trustees, and freemen are for the further consideration and upon the condition that, within three months after these presents shall be duly executed and acknowledged by each and all the above-named proprietors, the said president, trustees, and freemen of the village of St. Joseph shall cause a correct and accurate scale of the original survey of said village to be affixed to the original plat, or to a true transcript thereof, with a representation of the dimensions or size of the several lots, and the width of the streets and alleys, with the extension of Water street through the ship-yard, and the addition of

Digitized by Google

lots 488, 489, 490, 491, 492, and 493, as noted in pencil-mark on the original plat now in possession of Major Calvin Britain, and shall officially sanction the alteration made in regard to the ship-yard, and lay out and establish a continuation of Water street through the same, to be entered of record in the register's office of the county of Berrien,—then and in that case the title hereby granted be vested in the said president, trustees, and freemen of the village of St. Joseph, and their successors, forever, for the purposes aforesaid, with the right of reversion; but in case of failure of the considerations herein mentioned, or a violation of the conditions herein contained, the title hereby granted shall revert, so far as relates to the side-hill, or land lying between Vine and Front and Water streets and west of State street, to the undersigned and their heirs.

"In witness whereof, the said Enoch Jones and wife, Tollman Wheeler, and Calvin Britain in proper person, and Jonathan Hailman, Lucius Lyon, Lorain Marsh, William McKaleb, Junius H. Hatch, Warner Wing and wife, Charles Noble and wife, and Austin E. Wing and wife, by Thomas Fitzgerald, as their attorney in fact, have hereunto set their hands and seals the twenty-ninth day of July, 1834. (The words 'for ourselves and our heirs' interlined before signing, and also the words 'and Water.')

[Signed] "JUNIUS H. HATCH, [Seal.]
"By his Attorney, Thomas Fitzgerald. [Seal.]
"JONATHAN HAILMAN, [Seal.]
"By his Attorney, Thomas Fitzgerald. [Seal.]
"LUCIUS LYON, [Seal.]
"By his Attorney, Thomas Fitzgerald. [Seal.]
"TOLLMAN WHEELER and DELIA WHEELER, [Seal.]
"By their Attorney, Bacon Wheeler. [Seal.]
"CALVIN BRITAIN. [Seal.]
"JEREMIAH PRICE. [Seal.]
"BACON WHEELER. [Seal.]
"E. JONES. [Seal.]
"S. I. JONES. [Seal.]
"AUSTIN E. WING and [Seal.]
"HARRIET WING, [Seal.]
"By their Attorney, Thomas Fitzgerald. [Seal.]
"CHARLES NOBLE and [Seal.]
"ELIZA NOBLE, [Seal.]
"By their Attorney, Thomas Fitzgerald. [Seal.]
"WARNER WING and [Seal.]
"ELIZA A. WING, [Seal.]
"By their Attorney, Thomas Fitzgerald. [Seal.]
"WILLIAM MCKALEB, [Seal.]
"LORAIN MARSH, [Seal.]
"By their Attorney, Thomas Fitzgerald. [Seal.]"

Digitized by Google

That the piece of land described as lying between Front, Vine, and Water streets, and designated as "side-hill," has not been cleared, ornamented, or beautified; that it has not been improved in any respect, but, on the contrary, it has been used and claimed by the owners of adjacent lots as appurtenant to the same, and for the purpose of carrying on of business by different individuals.

That lot 283 remains vacant, but that the corporate authorities have executed a deed purporting to convey the same to one James B. Sutherland.

That lot 200 said corporate authorities have permitted to be occupied for a blacksmith shop.

That lot 274 is used by one Lydia Stinson for a stable.

That lot 229 has until lately been occupied for a school, and is now used for pasting show-bills.

That lot 245 has been conveyed by the corporate authorities to the trustees of the First Congregational Church of St. Joseph.

That lot 41 has never been occupied.

That lot 313 is occupied for a dwelling-house, and has been conveyed by such corporate authorities to the First Society of the Methodist Episcopal Church for a parsonage.

That lot 237 has been conveyed to said society for church purposes, and a house of worship erected thereon.

That lots 317, 394, and 399 are vacant, and have never been used or occupied for any purpose.

That lot 376 is occupied by the Roman Catholic Church, and lot 384 by the church of the German Baptist Society.

It is further claimed by said bill that neither the said president, trustees, and freemen, nor their successors or other person, has caused a correct and accurate scale of the original survey of the village of St. Joseph to be made, nor have said corporate authorities extended Water street, as by said deed they were required to do; that the court-house and jail

Digitized by Google

for the county of Berrien were located at Oronoko, in said county, by act of the Legislature, in 1837.

That at the time of the execution of said trust deed the grantors named had many other lots and pieces of land situated in the village of St. Joseph, and well hoped that the said corporate authorities would execute the trust thereby vested in them, according to the true meaning thereof; that the said corporate authorities have neglected and refused to execute the trust granted by said deed, and that by reason thereof such lots and pieces of land revert to the grantors named in said deed, their representatives and grantees; that said complainants have made efforts to sell said lands to pay certain legacies under said last will of Junius H. Hatch, deceased, but are unable to do so.

That while said lands are of great value, yet they cannot negotiate a contract for the sale of the same, by reason of the suspicion and cloud cast upon the title of complainants by said trust deed; and that complainants believe they could sell the same for a fair and reasonable price could such deed be canceled and set aside; and that the *grantors in said deed*, and their grantees, have at all times *been in possession* of all said lots and pieces of land not adversely occupied as hereinbefore stated.

That complainants are not able to ascertain with certainty who owns the other undivided parts of said land of which said deceased was not seized, but are informed and believe that they are owned by Benjamin C. Hoyt, Warren Chapman, Damon A. Winslow, Elizabeth Jane Williams, Julia A. Luce, and Sarah Martin, and that complainants have applied to said parties and solicited them to join as complainants in this bill, but that they refuse to do so.

That the common council of the village of St. Joseph have succeeded to all the rights, privileges, and franchises of the said president, trustees, and freemen of the village of St. Joseph, and that they, complainants, have made application to

Digitized by Google

said common council of the village of St. Joseph, and requested them to convey and release to complainants all their rights and interests in said lands, but they refuse so to do.

That they have also requested the said trustees of the First Congregational Church, the trustees of said First Society of the Methodist Episcopal Church, and the said James B. Sutherland, respectively, to convey and release their present title and claims to said lands to complainants, but they each refuse so to do.

It is further claimed in and by said bill that, if said trust deed ever granted any title to said trustees, yet, by reason of the neglect on the part of the grantees therein named, the same has become null and void, and the same is a cloud upon complainants' title; and complainants pray that said common council of the village of St. Joseph may, by order and decree of the court, be compelled to surrender and deliver up said trust, and that the same be canceled, and that the title of said trustees of the First Society of the Methodist Episcopal Church, the trustees of the First Congregational Church, and James B. Sutherland be declared to be void and be delivered up to be canceled.

The defendants the common council of the village of St. Joseph, the trustees of the First Society of the Methodist Episcopal Church in the village of St. Joseph, and the trustees of the First Congregational Church of the village of St. Joseph, appeared and demurred to said bill, setting out, as causes of demurrer, that the bill does not set forth any cause of action cognizable in a court of equity, and that said bill does not contain any matter of equity sufficient to establish any right or demands against the defendants.

The cause was brought on for hearing in the circuit court for Berrien county, in chancery, on the demurrer, and decree entered therein by said court dismissing said bill, with costs to defendants, on August 10, 1887; and from this decree complainants appeal.

Digitized by Google

Complainants now insist that, if the bill cannot be sustained as one to quiet title, yet it can be as one for partition, insisting that it contains all necessary statement of facts for that purpose, and that the court could grant relief under the general prayer "for such other and further relief in the premises as may be agreeable to equity."

Under the statutes in force prior to September 28, 1887, a bill to quiet title could only be maintained by one having the *actual* possession of the premises. How. Stat. § 6626; *Stockton v. Williams*, 1 Doug. 565. This is too well settled in this State to require citation of authorities. To entitle a party to relief he must show—

1. Possession.
2. A legal or equitable title in himself.
3. A claim set up by some other person.
4. His title must be substantiated. *Stockton v. Williams*, 1 Doug. 565.

The statute above cited was amended by Act No. 260, Laws of 1887, so as to read as follows:

"Any person claiming the legal or equitable title to lands, whether in possession or not, may institute a suit in chancery against any other person, not in possession, setting up a claim thereto in opposition to the title claimed by the complainant; and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claims thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands, and give a release to the complainant, in which case costs shall be awarded as the court may deem just."

If the facts set up in the bill would entitle the complainants to equitable relief, this Court might overrule the demurrer, and sustain the bill under the above statute as a bill to quiet title, though the statute was not in force at the time the court below dismissed the bill. We do not view the bill, however, as one properly filed to quiet title, or for partition; and the only question before us is whether there is any matter in the bill upon which any equitable relief whatever could

Digitized by Google

be justified. If there is, the demurrer cannot be sustained. The bill is not filed to *enforce* the trust created by the trust deed, but for the purpose of declaring a forfeiture, and thus revesting the property in the complainants.

Junius H. Hatch, when he made the deed of July 29, 1834, if he had not already done so by his former act of dedication, divested himself of his title in all the lands conveyed, so that only by some subsequent act or event could he have any further interest in it.

It is not necessary upon this record to determine whether any estate was left in Junius H. Hatch which was devisable or descendible to the devisees under the will, or to them as heirs at law, as all the material conditions in the deed were conditions subsequent. All the property except that called the "side-hill" is expressly conveyed upon trusts. The language of the deed expressly declares that as to that part so conveyed there shall be no reversion, and as to the remainder, or side-hill property, it is declared that in case of failure of consideration, or violation of the conditions therein mentioned, the title granted was to revert, so far as related to the side-hill. So that Junius H. Hatch divested himself absolutely of the title of all the property, without any power of revocation, except the side-hill property.

After the lapse of more than 30 years, and after other parties have acquired rights and interests therein, and in view of the fact that the deed expressly declares there shall be no reversion, we do not think this Court has any right to grant the relief prayed.

The property called the "side-hill" property, described as lying between Vine, Front, and Water streets, and west of State street, was the only property mentioned as being affected by the following provisions in the deed:

"But in case of failure of the considerations herein mentioned, or a violation of the conditions herein contained, the title hereby granted shall revert," etc.

Digitized by Google

And by another clause in said deed it is provided that—

"All that part of the said village lying between Front and Vine and Water streets which is painted or colored on the original plat, and designated as 'side-hill,' * * * be and forever remain a public common, and not be converted to any other use; that the same shall be cleared, ornamented, and beautified for a public walk or promenade, so soon as the public authorities shall deem it practicable to do so at their expense, but at all events within ten years."

This grant was a beneficial one, and the law presumes its acceptance by the grantees. These conditions were all conditions subsequent. The title vested in the grantees at the delivery of the deed, and if any forfeiture was incurred it was at the end of the 10 years from the delivery of the deed; and at that time, if complainants had any rights in this piece of property by reason of the forfeiture, such rights had then accrued. More than 25 years had elapsed since such rights accrued before filing this bill. Rev. Stat. 1838, pp. 573, 574, provide:

"The right to make an entry or bring an action to recover land shall be deemed to have first accrued at the times,
* *

"*Third.* * * * When the intermediate or precedent estate would have expired by its own limitations, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

"*Fourth.* The preceding clause shall not prevent any person from entering when entitled to do so by reason of any forfeiture or breach of condition; but, if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

"*Fifth.* In all cases not otherwise provided for, the right shall be deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title upon which the entry or action is founded."

These provisions have been carried in the statutes ever since. Rev. Stat. 1846, pp. 598, 599; Comp. Laws, 1857, pp.

Digitized by Google

1403, 1404; Comp. Laws, 1871, pp. 1974, 1975; How. Stat. § 8700.

Statutes of limitation will be applied in equity where they would bar the claim at law. *McLean v. Barton*, Har. Ch. 287, 288; *Smith v. Davidson*, 40 Mich. 633.

If the complainants ever had any rights in the property under the will of Junius H. Hatch, we think they have slept too long upon their rights; and from the facts appearing upon the face of the bill we do not think complainants have any rights relievable even in a court of equity, and the court was right in sustaining the demurrer.

The decree of the court is therefore affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

68 230
88 114

JOHN D. OLCOTT v. LEVERETT C. CRITTENDEN AND JAMES H. CANFIELD.

Mortgage—Foreclosure—Equity—Assignment of mortgage and note as security—Payment.

1. A statutory foreclosure is not adapted to cases where there are conflicting equities, which can only be worked out and protected in a court of chancery.

   So *held*, where the assignee of a mortgage, which, with the accompanying note, had been assigned as *security* by the mortgagee, foreclosed the mortgage by advertisement, which foreclosure was held *void*.

2. Where a purchaser of land takes the same subject to a mortgage held by a third party as security for the payment of a smaller debt due from the mortgagee, which he purchases from the assignee, and takes an assignment of the mortgage, with knowledge of the rights of the assignee therein, he will hold it in trust for the owner as to the balance due above the debt it was assigned to secure, for which balance the mortgage will remain a lien on the land.

Digitized by Google

Appeal from Berrien. (Smith, J.) Argued January 5, 1888. Decided January 19, 1888.

Bill to set aside a foreclosure at law and declare a mortgage fully paid, etc. Defendents appeal. Decree affirmed in part and reversed in part, and a new decree entered, and case remanded. The facts are stated in the opinion.

O. W. Coolidge and *E. L. Hamilton,* for complainant.

Edward Bacon, for defendants.

CHAMPLIN, J. On the twenty-fourth day of February, 1872, Philenda Case was the owner of a parcel of land situated in the village of Benton Harbor, Michigan, containing about one acre. On that day she executed a mortgage thereon to secure two promissory notes, one of $400, and the other of $500, payable, respectively, April 1, 1872, and November 1, 1875, both bearing interest at 10 per cent. The notes and mortgage were payable to George K. Hopkins. The note due April 1, 1872, was paid at maturity.

On February 6, 1875, George K. Hopkins made his promissory note, payable to the order of Parnell Crittenden, for $450, due November 1, 1875, with interest at 10 per cent. On the twentieth day of March, 1875, he assigned the unpaid note of $500, and the mortgage securing the same, to Parnell Crittenden, to secure the payment of his note to her. The assignment contained this condition, namely:

"The condition of this assignment is such that if the said George K. Hopkins shall pay to the said Parnell Crittenden the said four hundred and fifty dollars, and the interest thereon, on the first day of November, A. D. 1875, according to the conditions of a certain promissory note then due, assignment to be null and void, otherwise of force."

The mortgage was recorded February 8, 1875, and the assignment was duly recorded in the office of the register of

Digitized by Google

deeds of Berrien county within a couple of days after its execution.

On the twenty-fifth day of November, 1875, complainant purchased the mortgaged premises from Philenda Case, subject to a mortgage thereon for $500, and interest thereon, and, subject to that mortgage, he allowed said Philenda Case, in an exchange of land in Ohio therefor, $300, and in that way paid her that amount for her right, title, and interest to the Benton Harbor land, she warranting the title against everything except said mortgage. Complainant went into possession of the premises, and still owns and possesses the same. As between complainant and Mrs. Case, he never considered that he had any recourse against her, if he was obliged to, or did, pay the mortgage debt to remove the lien of the mortgage upon the land. He merely purchased Mrs. Case's right, title, and interest in the property, subject to the mortgage; or, in other words, he purchased her equity of redemption without assuming or agreeing to pay the mortgage debt. If he could make anything by paying it, he could do so; but, if the land was not worth enough to pay it, he could let the lien holder take the land. Such was the testimony of complainant, given on the hearing of this cause.

On the tenth day of March, 1876, the mortgage not having been paid, complainant, Olcott, applied to Parnell Crittenden, and purchased from her the Hopkins note of $450, which, with the interest to that time, amounted to $499.75; and she delivered the note, and executed an assignment of the Case mortgage, to Olcott, and at the same time delivered to him the note for $500, and the mortgage which secured its payment, executed by Philenda Case, and he has since held them in his possession. At the time of this transaction, complainant, Olcott, knew that Mrs. Crittenden held the Case note and mortgage as security for the payment of the Hopkins note to her.

Digitized by Google

On May 12, 1876, Hopkins, by a written assignment, transferred all of his right, title, and interest in the Case mortgage, and the $500 note secured thereby, to Leverett C. Crittenden, and covenanted that there was at least $25 due thereon. On the same day, Leverett C. Crittenden, by a written assignment, transferred the right, title, and interest which he acquired to James H. Canfield, covenanting therein that there was at least the sum of $25 due.

On September 13, 1876, Canfield commenced to foreclose the mortgage by advertisement. In his notice of sale he states the amount due and unpaid upon the mortgage to be $145.78. The premises were sold under the foreclosure proceedings, and bid off by James H. Canfield for $204.27, and a deed was executed to him by the sheriff bearing date December 8, 1876, and was filed, properly indorsed, in the office of the register of deeds for Berrien county on December 9, 1876.

On the sixth day of December, 1877, two days before the deed to Canfield would become operative to bar all equity of redemption, the complainant, Olcott, filed his bill of complaint in this cause, charging that the proceedings of Canfield to foreclose the Case mortgage were null and void; that neither he, nor Crittenden, nor Hopkins had any legal title to the note and mortgage after the assignment thereof to Parnell Crittenden; and he further charges that neither of said persons—

"Have any equitable interest, right, or title in said mortgage, but that the same has been fully paid, satisfied, and discharged by your orator."

And he charges, further, that the sheriff's deed and certificate constitute a cloud upon his title to said land, and prevent him from making a sale thereof. He prays that the sale to Canfield may be declared null and void, and be set aside, as also the sheriff's certificate of sale, and that said mortgage and notes of Philenda Case to George K. Hop-

Digitized by Google

kins may be adjudged to be fully paid and satisfied, and for such other and further relief as shall to the court seem proper.

The defendants answered, setting up that when Olcott, under the circumstances of his purchase of the fee from Philenda Case, paid the $499.75, it was a payment *pro tanto* of the Hopkins mortgage; that thereby the mortgage of the Case note and mortgage to Parnell Crittenden was redeemed and paid, and said George K. Hopkins thereby became the legal owner of the said Case note and mortgage, and all sums remaining due thereon, without any lien or claim against the same. They also claim that, if the statutory foreclosure should be held void, they have a lien, under and by virtue of the Case mortgage, for the amount secured over and above the amount due on the Hopkins note to Parnell Crittenden, which Leverett C. Crittenden, the owner thereof, is entitled to enforce; and that he has paid the taxes on the premises one year since the complainant bought; and he prays relief in the same manner and to the same extent as if he had filed a cross-bill to foreclose the Case mortgage for the amount due him.

The attempted foreclosure of the mortgage by advertisement was a nullity. The statutory foreclosure is not adapted to cases where there are conflicting equities, which can only be worked out and protected in a court of chancery. In this case the legal title to the note, and the record title to the mortgage foreclosed, had passed out of Hopkins by his assignment to Parnell Crittenden, and the delivery of the original note to her. The record also showed that Parnell Crittenden had assigned to the complainant, Olcott. Hopkins could not, by another assignment of the same note and mortgage to Leverett C. Crittenden, so vest the legal title to the note and mortgage in him as to authorize him to proceed and foreclose by advertisement. To permit proceedings of this kind would injuriously affect the rights of the owner of the equity of

Digitized by Google

redemption, not only in rendering it uncertain to whom the redemption money should be paid, but, in case of foreclosure sale, the value of the equity would be greatly depreciated, occasioned by the uncertainty of the ownership of the security, and his right to foreclose, and the consequences would be a sale at a sacrifice. The foreclosure was unauthorized, and the sheriff's certificate and deed thereunder must be decreed to be void and of no effect.

The next question that arises is, what effect should be given to the purchase of the Hopkins note by complainant of Parnell Crittenden, and the assignment to him of the Case note and mortgage, which was held by her as security for the payment of the Hopkins note? The claim of the complainant in his bill of complaint is that the Case note and mortgage has been fully paid, satisfied, and discharged by him. This claim must rest upon the theory that, having purchased the fee subject to such mortgage, he had a right, if he thought it best for his interests, to pay off the incumbrance, and free his land from the lien thereof, and that the purchase and payment of the Hopkins note should be applied to the extinguishment of the lien; and by taking the assignment of the Case mortgage the legal and equitable title became merged in him, and the lien created by the mortgage extinguished.

When we consider the circumstances under which the complainant purchased the property, having bought it subject to the Case mortgage, and the amount thereof constituting a portion of the consideration received by Mrs. Case; and when we consider, also, the testimony attending the payment of the money to Parnell Crittenden by complainant, when he took the assignment of the mortgage to himself,—we are led to the conclusion that it was the intention of complainant, Olcott, that the amount paid to Mrs. Crittenden should apply upon the Case mortgage towards the extinguishment of the lien created by the Case mortgage. Indeed, there does not

Digitized by Google

appear to be any other good reason why he should apply to Mrs. Crittenden to obtain an assignment, unless it was to pay off the Case mortgage, and obtain a removal of the lien.

It appears that Hopkins had failed in business, and was insolvent, and that the complainant knew, when he paid to Mrs. Crittenden the amount due her from Hopkins, that she only held the assignment of the Case mortgage as security, and that she was not the absolute owner thereof. Complainant in that transaction also recognized a right and interest in Hopkins in the Case mortgage, and as being entitled to the surplus of the Case note over and above the amount for which Mrs. Crittenden held it as security. The amount, therefore, paid by him to Mrs. Crittenden can be held to discharge the lien of the Case mortgage only *pro tanto*. He could not, without paying the whole mortgage debt to Mrs. Crittenden, discharge the entire lien. Had he paid the whole amount of the mortgage debt to Mrs. Crittenden, she would, after applying sufficient to pay the debt from Hopkins to her, have held the balance in trust for Hopkins.

Acceding to the complainant's claim as to the application of the moneys paid to Mrs. Crittenden, and that it should apply to the payment of the mortgage debt upon his land, the question remains whether his claim is true that the whole mortgage debt was paid thereby and the mortgage discharged. We think the payment discharged the lien of the mortgage to the extent of the payment made, and no further. The result is that he holds the Case mortgage in trust for Leverett C. Crittenden, who now appears to be the one entitled to receive the balance due upon it; and, to the amount of such balance, it remains a lien upon the land, which defendant Leverett C. Crittenden has a right to have enforced in equity. This may be done in the present suit.

The court below, contrary to the complainant's claim, and contrary, as we think, to the testimony by which the equi-

Digitized by Google

table rights of the parties are to be governed, decreed that there was due to complainant upon the Case mortgage $1,001.25, and that if Leverett Crittenden should tender and pay complainant, within 60 days, said sum, with costs of suit, then complainant should re-assign said mortgage, and the notes accompanying the same, and he should have the right to foreclose the same; but, if Crittenden did not make such payment and tender, then the complainant might proceed to have the land sold by and under the dictation of a circuit court commissioner of the county of Berrien, such sale to be made and conducted in the same manner as sales under foreclosure of mortgages in courts of chancery, and that the commissioner should execute a deed to the purchaser. No direction is made for the distribution or application of the moneys which shall have been received upon the sale, and none is directed to be paid over to Crittenden. While the decree recognizes that he has a right to redeem from the mortgage of the mortgage, it recognizes no right in him to any interest in the mortgage beyond the debt to complainant.

This decree is affirmed so far as it declares the statutory foreclosure invalid, and it must be reversed as to the residue, and a decree will be entered here ascertaining the amount due to Leverett Crittenden upon the Case note and mortgage, and the taxes paid by him, and fixing the time for the payment thereof by the owner of the equity of redemption in 60 days from the entering of the decree in this Court, and, in default thereof, for a foreclosure and sale of the mortgaged premises to satisfy such decree in the usual manner of foreclosure sales in chancery.

After the decree is entered in this Court, the record will be remanded to the circuit court for the county of Berrien, in chancery, for execution. Neither party will recover costs in this case.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 238
72 629

L. Eugene Champlain v. The Detroit Stamping Company.

Contract of employment with traveling salesman—Action against employer for refusal to perform—Evidence—Damages.

1. In a suit by a traveling salesman to recover damages for the alleged wrongful refusal of a company to furnish him employment for a fixed period and at a stated salary, according to a contract counted upon, to which declaration the defendant pleaded the general issue only, testimony on the part of the company of representations made by the plaintiff of the amount of goods he could sell is not within the pleadings, and therefore incompetent; and testimony of what other agents of the company had done at other times, and under other circumstances, is immaterial, having no tendency to show what ability the plaintiff possessed in the like direction.
2. An instruction to a jury, in a suit for damages for an alleged wrongful discharge from employment, that the plaintiff is bound to use diligence in seeking other work, and performing it if found, in which case it should be deducted from or set off against his claim for damages, sufficiently covers a request for an instruction that if the plaintiff obtained such employment, which he voluntarily relinquished, he can only recover for the time subsequent to securing the same the *difference* between the two contract rates.

Error to Wayne. (Chambers, J.) Argued January 5, 1888. Decided January 19, 1888.

Assumpsit for breach of employment contract. Defendant brings error. Affirmed. The facts are stated in the opinion.

Chamberlain & Guise, for appellant.

George S. Hosmer, for plaintiff.

Sherwood, C. J. The plaintiff sues to recover upon the following contract, made between the parties, and signed by them:

Digitized by Google

"This is to certify that The Detroit Stamping Company have this twenty-fifth day of March, 1885, entered into an agreement and contracted with L. E. Champlain to travel and represent them, The Detroit Stamping Company, on the road in the State of Michigan for one year, or until the twenty-fifth day of March, 1886, at a salary of nine hundred dollars ($900), and all necessary traveling expenses while on the road for the time specified: Provided, he gives the said company the full benefit of his ability, and his health does not prevent constant work."

The plaintiff avers in his declaration that he entered the defendant's service under this contract, and gave the company the full benefit of his services, and performed his duties therein to the best of his ability, and according to the terms of the agreement, from the twenty-fifth of March to the twenty-eighth day of October, 1885, and was willing and ready to continue his service for the full period agreed upon in the contract, and that his health has always been such as to enable him to work constantly; but that the defendant, on the twenty-eighth of October aforesaid, refused to carry out its agreement with him, and wrongfully and without cause discharged him from its employment, and has ever since refused to give him the labor contracted for, or to pay him therefor; and that, after diligent efforts to obtain employment for the balance or the period mentioned in the contract, he was unable to get work; and the defendant, by reason of the premises, became liable to him in the sum of $900, which it refuses to pay. The common counts are added.

The defendant, by its attorneys, pleaded the general issue. The trial was had in the Wayne circuit before a jury, and the plaintiff had a verdict and judgment for $438.14.

Three errors are assigned upon the record. Two relate to testimony offered and rejected, and one to the refusal to charge as requested. The following are those relating to the rejected testimony:

"1. That the said circuit court erred in rejecting the offer

Digitized by Google

of the testimony of L. M. Miller, a witness called by defendant, which is as follows:

'Defendant offers to show, by the witness on the stand, that the plaintiff represented to him that he could sell $20,000 worth of goods per annum; that agents who had immediately preceded him at times when business was dull—very much duller as compared with the time that plaintiff was selling goods—had succeeded in selling a larger proportion of goods upon the same route traveled by plaintiff, and to the same customers, and at the same prices, in the same places, in other years; and that other travelers employed by the company, who immediately succeeded him, were successful in selling a very much larger proportion of goods at the same prices at times when business was very much duller and more stagnant than at the time when plaintiff was selling.'

"2. That said court erred in rejecting the offer of the testimony of said Miller, which is as follows:

'We propose to show, further, by the witness on the stand, that the sales of the plaintiff—the gross sales of the plaintiff—amounted to only a few dollars more than his salary and expenses during the time that he was traveling.'"

The objections to this testimony were that it was incompetent and immaterial. It was clearly subject to the objections made. That portion relating to the representations alleged to have been made by the plaintiff was not within the pleadings in the case, and therefore incompetent; and what other agents of the defendant had done at other times, and under other circumstances, was immaterial, and had no tendency to show what the plaintiff had the ability to accomplish and could do.

The request refused, which is the defendant's third alleged error, is as follows:

"If the plaintiff, at any time subsequent to his discharge, obtained employment, and voluntarily resigned or relinquished the same, he cannot recover any sum for the time subsequent to securing such employment, excepting the difference between the contract rate with defendant and the contract rate with such subsequent employer."

The court charged the jury as follows, upon this subject:

Digitized by Google

"The plaintiff is bound to use diligence in seeking other employment, and, if he might obtained other employment by such diligence, they must deduct from the plaintiff's claim the sums he might have earned. That is true.

"If the plaintiff, at any time subsequent to his discharge, obtained other employment, and resigned and relinquished it, I will say, with reference to that, that is covered by what I have already stated to you. It is the duty of every employé to search for other work, and, if he can find it, to do it; and that should be deducted from any damage he may have sustained by reason of being discharged from his other employment. He should always endeavor to be employed, so that it might be deducted or set off against the claim that he makes."

We think the charge given sufficiently covers the ground included in the defendant's third request.

We find no error in the record, and the judgment must be affirmed.

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 242
73 257
68 242
84 516
68 242
126 507

GEORGE N. POTTER v. EDMUND W. HUNT AND CLARK SLOAN.

Joint defendants—Appeal—Assignment of judgment in payment of attorney fees.

Where appeals were taken by one of two defendants from justice's judgments, and prosecuted by *him* to final judgment for costs in the circuit court, his co-defendant refusing to join in such appeals or bear a share of the expenses attending the same, a satisfaction of said judgment by said co-defendant, filed in the case, should be set aside, and such costs retaxed in favor of the active appellant, on his motion, it appearing that prior to such satisfaction he had turned the judgment over to his attorneys in payment of their fees.

Certiorari to review the judgment of the circuit court of Eaton county, denying a motion to vacate a satisfaction of a judgment, etc. Argued January 6, 1888. Decided January 19, 1888. Judgment reversed, and record remanded, with directions to grant the motion. The facts are stated in the opinion.

Huggett & Smith, for defendant Hunt, who is the plaintiff in *certiorari*.

Parm S. DeGraff, for plaintiff.

SHERWOOD, C. J. The above-named plaintiff, in 1879, commenced two suits against the above-named defendants before Justice DeGraff in the county of Eaton. The claim of the plaintiff in each case was upon a promissory note made by the defendants.

No defense was made in either case before the justice, and on the thirty-first day of March, 1879, judgment was rendered by the justice,—in one case for $300 damages, and $8.63 costs, and in the other for $285.37 damages, and $5.73 costs,

Digitized by Google

—in favor of the plaintiff. An appeal was taken in each case to the circuit court for the county of Eaton, by the defendant Hunt.

It appears from the record that the defendant Sloan refused to make defense to the claim of plaintiff in either suit, but was at the time the same were commenced, and ever since has continued to be, insolvent, and inimical towards Hunt and friendly to the plaintiff and his claims, and that in consequence of these circumstances Hunt was obliged to make his appeals to the circuit alone, and give the necessary bonds for that purpose, and was himself, both before the justice and in the circuit, obliged to look after the cases, make the defenses therein, and be to all the trouble, labor, and expense of the same.

The defendant Hunt employed attorneys after the causes were appealed, and, upon the consent of the parties, the two causes were consolidated and tried as one in the circuit, before Judge Hooker, with a jury, and the defendant Hunt prevailed, and the judgment was rendered for costs against the plaintiff. The costs were subsequently taxed at the sum of $71.13 by the clerk of the court, on consent of the plaintiff's attorney.

It appears that, while the proceedings were all had on the part of the defendants by defendant Hunt alone, they were carried forward in the name of both defendants, as the suits were originally commenced, except so far as the affidavits and bonds on appeal disclose. In these it appears clearly that the appeals were taken in the interest of defendant Hunt, and for the purpose of redressing his aggrievances in the cases.

Judgment in the circuit was rendered on the twenty-ninth day of April, 1879, and the costs were taxed on the twenty-seventh day of November, 1886.

On the thirtieth day of November, A. D. 1886, the defendant Sloan executed a receipt to the plaintiff, without the

Digitized by Google

knowledge or consent of the defendant, acknowledging full satisfaction of the judgment, and signed the same—

"Edmund W. Hunt and Clark Sloan, Defendants and Appellants, by Clark Sloan, One of said Defendants,"—

And which the plaintiff claims relieves him from all liability upon the judgment.

On the sixteenth day of December, 1886, the defendant Hunt made a motion to vacate and set aside the satisfaction of said judgment filed by the plaintiff in the case, thus obtained from the defendant Sloan, and direct a retaxation of said costs in favor of the defendant Hunt. This motion was denied by the court. It was based upon the affidavit of defendant Hunt and several others, showing that, before said receipt was obtained, the defendant Hunt had turned out to his attorneys in the case the bill of costs, as taxed, to be applied by them upon their retainer and fees charged for services in the case, and which amounted to as much as the bill of costs taxed. The affidavits further state in substance that the plaintiff, in order to obtain an undue and unjust advantage over defendant Hunt in the premises, secured the aid of said Sloan, and that by fraudulent collusion with him, against the just rights of the defendant Hunt, he obtained and filed in the circuit court satisfaction of said judgment, now asked to have vacated and stricken from the files.

The affidavits upon which the motion was based do not seem to be contradicted, neither is the affidavit made for the writ in the case falsified by anything appearing in the return made thereto. The defendant Hunt claims that his attorneys had a lien upon the judgment which could not have been ignored by either defendant, and that his equitable and just rights entitle him to the order he asked of the circuit court.

We think under all the circumstances disclosed in the record the circuit judge should have granted the order prayed for in the motion. There is no law or rule of practice pre-

Digitized by Google

venting the circuit judge from requiring the parties to recognize the just rights of each in the premises, and the rights of their or either of their attorneys to the costs collected; and, in view of the fact that Sloan was not only insolvent, but refused to give any aid of any kind to his co-defendant and alleged co-obligor upon the claims sued upon, and which turned out to be illegal, in getting rid of them, it rendered the duty of the court almost imperative to afford such protection to Hunt's interests as would prevent their being placed under the control of the plaintiff and his unfriendly co-defendant.

The plaintiff certainly had knowledge of all facts appearing upon the records and files in the cases, and from these alone he could not fail to take knowledge that the appeal was taken in the interest of Hunt; that the defense was prosecuted by him, and that he was the party who claimed to be aggrieved; that Sloan had taken no part in the defense; and that Hunt had in his employ attorneys to assist him. The plaintiff had no right to ignore these facts, and they alone required him to ascertain, in some way, whether or not the lien and interest in the judgment which they established in the defendant Hunt and his attorneys had been released or not. This he failed to do, and which, if the affidavits suggest the true facts, he designed and colluded not to do, and he thereby subjected himself to the legal consequences of the course he saw fit to take. These views are fully sustained by our own authorities. *Wells v. Elsam*, 40 Mich. 218; *Kinney v. Tabor*, 62 Mich. 517 (29 N. W. Rep. 86). See, also, How. Stat. § 7710; *Williams v. Ingersoll*, 89 N. Y. 508; *McGregor v. Comstock*, 28 Id. 240.

The judgment of the circuit court upon the motion must be reversed, with costs, and the record will be remanded, with direction to the circuit judge to grant the defendant Hunt's motion.

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

HENRY MCMORRAN AND EDMUND B. HARRINGTON v. SAMUEL A. MURPHY, IMPLEADED WITH ALFRED CHESEBROUGH AND WILLIAM G. CHESEBROUGH.

Chattel mortgage—Renewal of notes—Payment—Good-faith purchaser—Replevin.

1. Renewal notes given in lieu of others, on which no payments were in fact made, cannot be treated as *payments* of the original notes.
2. In replevin for chattel-mortgaged property, the mortgagor is not estopped from testifying to its sale, prior to the filing of the mortgage, to third parties, to whom he gave no information of said mortgage lien, it being desirable, if such vendees were innocent purchasers, to show that fact and avoid litigation.

Error to Wayne. (Jennison, J.) Argued January 6, 1888. Decided January 19, 1888.

Replevin. Defendant Murphy brings error. Reversed. The facts are stated in the opinion.

Moore & Moore, for appellant.

Moore & Canfield, for plaintiffs.

MORSE, J. This is an action of replevin for certain steam-pumps and other wrecking apparatus.

The property was sold by plaintiffs to defendant Murphy upon a written contract, which provided, among other things, that all the property described in and sold by virtue thereof—

"Shall be liable, and this agreement shall constitute a lien or mortgage on said property to secure payment of the notes of said second party for amounts above stated, at the times stated; and said first parties are hereby authorized and empowered, in case default is made in payment of said notes, or any of them, when due, to take said property, or any of

Digitized by Google

it, wherever found, and sell and dispose of the same in the same manner as in case of chattel mortgage on default thereof," etc.

The consideration of the purchase was $29,000. One thousand dollars was paid in cash at the date of the contract, and the balance secured by four promissory notes,—one for $5,000, at 6 months; one for $6,000, at 12 months; one for $7,000, payable in 18 months; and one for $8,000, in 2 years. Two thousand dollars was to be paid by Murphy to retire a note of McMorran's, payable to one Jones, in New York.

The notes and sums mentioned were all paid save the $7,000 and $8,000 notes. These the plaintiffs claimed to be unpaid, and the sum of $15,000, with interest, due and unpaid at the time they issued their writ of replevin. They claimed the right to the possession of the property under the mortgage lien expressed in the contract of sale.

The defendant Murphy claimed that these notes were paid, and exhibited them in his possession and canceled at the time of the trial.

The evidence shows that, when the $7,000 note became due, Murphy did not have the money to pay the same. He made an arrangement with McMorran by which the latter accepted two drafts drawn upon him by Murphy. Murphy discounted these drafts, and paid and took up the note. These acceptances were renewed from time to time until April 25, 1885, when McMorran took them up, and Murphy gave him a new note for $7,000.

The contract and original notes were executed April 13, 1882. At the maturity of the $8,000 note, Murphy was unable to pay it, and gave McMorran a new note for $8,000; taking up the old one. This note was renewed once or twice. No payments were made upon the original note except by the giving of the new note and its renewals.

The plaintiffs demanded the property of Murphy before suit was brought, and he refused to deliver it.

Digitized by Google

The defendant requested the court to direct a verdict in his favor. The request was refused, and the jury were instructed that, if any of the indebtedness specified in the contract was due and unpaid at the time the suit was commenced, the plaintiffs were entitled to recover; that if the $7,000 and $8,000 notes, then in the possession of the plaintiffs, were in renewal of the notes for similar amounts mentioned in the agreement, the giving of the notes as such renewals would not amount to a payment, and plaintiffs should recover.

We think the court was right in this direction. The evidence is undisputed that no part of the $7,000 or $8,000 notes were paid in fact. The notes finally given in place of them must be considered as renewals of the original ones.

Upon the trial the defendant's counsel undertook to show by the defendant that the title to the property at the time of the demand and the replevin was in other parties, to wit, the International Wrecking Company of Windsor, and the Detroit Tug & Transit Company; which evidence was excluded by the court.

Murphy, at the time the contract was made, was a resident of Detroit. The contract was not filed or recorded there until October 27, 1885,—long after it is claimed it was purchased by these companies.

We think the evidence was admissible. Murphy was not estopped from testifying that he had sold the property, or to whom he had sold it, or that he did not acquaint them with the existence of the mortgage lien upon the property. It is claimed by the counsel for the plaintiffs that there is nothing to show but that these companies were mere myths, and that they are not, if in actual existence, parties to this suit. The defendant, however, was refused any opportunity to show the existence of these corporations. The fact that they were not parties to the suit by name could not preclude them from showing, through the defendant, that the title of the property was

Digitized by Google

in them, if he saw fit to make that defense. If these companies were in fact the owners of the property, and innocent purchasers, it would be desirable, in order to save litigation, that such fact be shown in this case.

For the error in the rejection of this proposed testimony the judgment of the court below must be reversed, and a new trial granted, with costs to the defendant.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

HERSCHEL WHITAKER, RECEIVER, v. STEPHEN B. GRUMMOND.

Corporations—Stock subscription—Compromise—Exchange of stock.

1. Corporate authorities, and generally the directors, have power to compromise any corporate debt, and if, in the collection of subscriptions, there is any doubt as to the liability of a subscriber, the corporation may compromise the liability, and release a part for the purpose of securing the residue.
2. A compromise made in good faith by the directors of a corporation with a stockholder, by which he is released from one-half of his subscription on payment of the residue, while subject to the rights of creditors, is binding upon the stockholders of a new corporation organized by those of the one first named, who exchanged their stock for an equal amount of that of the new company, said subscriber making his subscription on the basis of said compromise, of which fact the other stockholders had full notice.

Error to Wayne. (Speed, J.) Argued January 6, 1888. Decided January 19, 1888.

Assumpsit for balance alleged to be due on stock subscrip-

Digitized by Google

tion. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

H. C. Wisner, for appellant.

Moore & Canfield, for defendant.

LONG, J. On the twenty-third day of October, 1883, the Clarke & Granger Manufacturing Company was organized as a corporation under Act No. 187, Laws of 1875, and in the month of November, 1883, the defendant, with others, signed a subscription for stock in said corporation, of which the following is a copy:

"DETROIT, MICH., November —, 1883.

"We, the undersigned, hereby subscribe our names for stock in 'The Clarke & Granger Manufacturing Company,' of Detroit, Michigan, to the amount below specified, at 50 per cent. of its par value, payable as follows: Ten per cent. of said amount to be paid down when the amount of $37,500 is entirely subscribed; the second installment of fifteen per cent. to be paid when the building contract is let; and the third installment of twenty-five per cent. to be paid when the tools of trade are contracted for; and the balance (fifty per cent.) to be paid when the works are ready for operation."

There were 62 signers to this subscription to stock, the whole amount of the stock subscribed being 3,020 shares, par value of $25 per share, the defendant being a subscriber for 200 shares.

The buildings referred to in said subscription were constructed, the tools of trade purchased, and the works of the company gotten ready for operation, and were in full operation on July 1, 1884.

From the date of said subscription until about August 1, 1884, said defendant acted as a stockholder in said company as the representative of 200 shares of its stock, and at the stockholders' meeting voted on the basis of being the subscriber of 200 shares. The defendant was first called upon to pay 10 per cent. of his subscription, and paid the same,

Digitized by Google

being $250, and also paid thereafter 15 per cent. of said subscription, being $375.

On August 21, 1884, the secretary of the company called upon defendant for the payment of the balance of his subscription of $1,875. Defendant refused to pay the same, claiming that he was only to take 100 shares, and that that was the understanding when he subscribed for the 200 shares; that he was ready and willing to pay the balance of the 50 per cent. upon the 100 shares, of $625. The secretary of the company reported defendant's proposition to the board of directors, who directed the secretary to make a settlement with defendant on that basis. The board of directors consisted of five members at that time; Mr. Moran, Mr. Clarke, Mr. Granger, and the secretary, all agreeing to accept defendant's proposition. Mr. Dunneback, the secretary, and one of the directors, then made such settlement with defendant, issued to him a paid certificate for 100 shares of stock, and received from defendant $625, balance due thereon at 50 per cent. of its par value, in accordance with such subscription. On October 10, 1884, at a special meeting of the stockholders, the following resolution was passed:

"*Resolved,* That whereas, difficulties have arisen in relation to the raising of the necessary means to carry out the objects of this corporation, it is advisable that a new company should be organized, based upon the property of this company, for this purpose, and to which the stockholders present agree, upon the following basis:

"1. That a new corporation be formed, to be called 'The Granger Engine Works,' with a capital of one hundred and fifty thousand dollars.

"2. That there be issued to the following-named persons stock in such company as follows, which shall represent all their stock in the new company, viz.: Harry W. Granger, 450 shares; Joseph F. Dunneback, 250 shares; Charles T. Moran, 250 shares; John S. Clarke, 250 shares.

"3. That there be issued to all other stockholders of this company, who have paid in full therefor, the same number of shares they now have.

Digitized by Google

"4. That there be issued to such stockholders as have not paid for their shares the same number of shares they subscribed in this company, upon payment of the balance due thereon."

The following resolution was adopted at a meeting held on the twenty-eighth of October:

"*Resolved*, That all the property, real and personal, and effects of this company, be sold to The Granger Engine Works for the sum of one dollar, and the assuming by that company of all the liabilities of this company, and that the president, or the vice-president and the secretary, make the necessary conveyance and transfer to The Granger Engine Works therefor."

The Granger Engine Works was duly organized as a corporation under Act No. 187, Laws of 1875, and amendments thereto, on the sixteenth day of October, 1884, and the defendant, with others, signed a subscription for stock in said corporation, of which the following is a copy:

"The undersigned, for and in consideration of one dollar to each of us paid by The Granger Engine Works, and in consideration of the exchange of our stock in the Clarke & Granger Manufacturing Company for stock in The Granger Engine Works, do hereby subscribe for the number of shares in The Granger Engine Works set opposite the names of each hereto, and, where the same is not already paid for in full, do each hereby agree to pay The Granger Engine Works the amount unpaid *thereon*, as *stated hereon*, within thirty days from this date, and hereby waive any callfor the same as an assessment therefor.

"*Detroit, October* 23, 1884."

Nearly all of the subscribers to the capital stock of the Clarke & Granger Manufacturing Company under this agreement became subscribers to the capital stock of the Granger Engine Works. The defendant subscribed upon such agreement for 100 shares of such capital stock, and set opposite his name thereon appears the following in the column of shares, "100 only;" and in the column "Paid" appears, "1,250, Oct. 27, '84." A bill of sale and contract was then made as follows:

Digitized by Google

"This bill of sale and agreement, entered into this eleventh day of November, A. D. 1884, between the Clarke & Granger Manufacturing Company of Detroit, Michigan, of the first part, and the Granger Engine Works of the same place, of second part.

"The party of the first part, in consideration of a resolution adopted by its stockholders at a meeting thereof, held on the twenty-third day of October, A. D. 1884, and of one dollar to it paid by the party of the second part, and its agreement hereunder to pay all the debts and liabilities of the party of the first part, doth hereby transfer, sell, and deliver to the party of the second part all of its property, real and personal, and effects of every name and nature, to have and to hold the same unto the party of the second part and its assigns, forever.

"And the party of the second part doth hereby, in pursuance of a resolution of its stockholders at a meeting thereof, on the twenty-third day of October, A. D. 1884, purchase all the property, real and personal, and effects of the Clarke & Granger Manufacturing Company as above conveyed by it, and the party of the second part doth hereby assume and promise to pay to the holders thereof all the debts and liabilities of the said party of the first part.

"In witness whereof the said parties have hereto set their respective corporate seals the day and year first mentioned.

"THE CLARKE & GRANGER MFG. CO.,
"By Alfred Chesebrough, President.
"J. F. Dunneback, Secretary.
"THE GRANGER ENGINE WORKS,
"William McKay, President.
"J. F Dunneback, Secretary.
"In presence of D. C. HOLBROOK.
"THOMAS HISLOP."

The Granger Engine Works Company took possession of such property, and continued business up to December 9, 1885, when, at a meeting of its board of directors, the following resolution was adopted by such board:

"WHEREAS, The stock, property, and effects of The Granger Engine Works have been so far reduced, by losses and otherwise, that it will not be able to pay all just demands to which it may be liable, or afford a reasonable security to those who may deal with it:

Digitized by Google

"*Resolved*, That proceedings be at once instituted to dissolve said corporation, and wind up its affairs, in accordance with law."

Such proceedings were afterwards had in the superior court of Detroit, in chancery, that on the third day of April, 1886, a decree was made and entered dissolving such corporation, and appointing Herschel Whitaker (plaintiff herein) receiver of its property and effects.

The declaration is in assumpsit, and contains three counts. If the plaintiff has a right to recover, it must be under the first count, in which it is claimed that the defendant became a subscriber to 200 shares of the capital stock of the Clarke & Granger Manufacturing Company, at 50 per cent. of its par value, according to the terms of the subscription paper hereinbefore set forth; and that although the defendant, in part performance of his said promise and undertaking did pay to said corporation the sum of $1,250, yet he, not regarding his said promises, hath not paid the balance of the sum so promised by him, amounting to $1,250.

That the Clarke & Granger Manufacturing Company sold, assigned, and transferred its claim thereto, and the right of action therefor, to the Granger Engine Works, a corporation organized and existing under the act aforesaid, of which sale, assignment, and transfer the defendant had notice, and thereby the defendant became indebted in said amount to said The Granger Engine Works, etc.

To this declaration the defendant pleaded the general issue. At the close of the trial the court directed a verdict for the defendant, and plaintiff brings error.

Plaintiff claims to recover the value of the 100 shares subscribed by the defendant to the Clarke & Granger Manufacturing Company, and insists that such subscription was a debt due from the defendant to the Clarke & Granger Manufacturing Company, and, as such, passed under the bill of sale to the Granger Engine Works, and, as receiver of such

Digitized by Google

corporation, he can maintain this action; that the Clarke & Granger Manufacturing Company, by its board of directors, had no right to compromise with defendant for the value of the 100 shares; and that their action thereon was illegal and void, for the following reasons:

1. That the board of directors had no authority to make such compromise.

2. That it was not founded upon any sufficient consideration to support it.

3. That it was a fraud upon the rights of the other subscribers.

Whether this subscription to the capital of the Clarke & Granger Manufacturing Company was such a debt as passed to the Granger Engine Works under the bill of sale is very questionable. *Wells v. Rogers*, 50 Mich. 294 (15 N. W. Rep. 462); Id., 44 Id. 411 (6 N. W. Rep. 860). As we view the case made by this record, however, we need not pass upon that question, and we express no opinion thereon.

We therefore pass to the principal question involved, and which is decisive of the controversy. Was the defendant released upon his subscription to the 100 shares, for the value of which this suit is brought, by the action taken by the directors and the proceedings of the stockholders at their meeting held on the tenth day of October, 1884? It appears that a dispute had arisen between the directors of the company and the defendant as to the conditions upon which the defendant signed the subscription paper for 200 shares of the capital stock of the Clarke & Granger Manufacturing Company. When called upon to pay his subscription by the secretary of the company he refused to pay for the 200 shares, but offered to pay in full for 100 shares, upon condition that he might be released from the payment of the other 100. This was reported by the secretary to five of the directors, and the secretary was then directed by them to make the arrangement. This the secretary did, and the

Digitized by Google

defendant then paid $625, the balance due upon the 100 shares. On the tenth day of October following this arrangement, at a meeting of the stockholders, the resolution was passed as set out in the statement of this case, in the third clause of which appears the following:

"That there be issued to all other stockholders of this company, who have paid in full therefor, the same number of shares they now have."

And the fourth clause provides—

"That there be issued to such stockholders as have not paid for their shares the same number of shares they subscribed in this company, upon payment of the balance due thereon."

Examining, now, the subscription paper of the Granger Engine Works, we find the language used,—

"And, where the same is not already paid for in full, do each hereby agree to pay The Granger Engine Works the amount unpaid *thereon*, as stated *hereon*."

This subscription paper provided for an exchange of the stock of the Clarke & Granger Manufacturing Company for an equal amount of stock of the Granger Engine Works, and we find the defendant's subscription to this latter stock was for 100 shares, and marked upon such paper as paid in full. It cannot, therefore, be doubted that the stockholders of the Granger Engine Works were advised of the settlement made by the directors of the old company with the defendant, and acted upon it, and took his subscription for 100 shares only of their capital stock.

Corporate authorities, and generally the directors, have power to compromise any corporate debt, and if, in the collection of subscriptions, there is any doubt as to the liability of the subscriber, the corporation may compromise the liability, and release a part for the purpose of securing the residue. Cook, Stock, § 171. Here was a compromise made in good faith, acted upon by the stockholders in the formation of the

Digitized by Google

new company. While it could not take away any right which creditors had acquired, yet it must be held binding upon the stockholders of the new company.

The receiver of the new company, the plaintiff in this case, does not represent the stockholders of the old company, and he does not represent the creditors of the old company, if it has any. No stockholder or creditor of the old company makes complaint of this settlement, so far as this record discloses.

We think from the circumstances disclosed by this record that the settlement by the directors of the old company with the defendant has been acquiesced in by the whole number of stockholders of the new company, and that they are now estopped from attacking it. *Bath's Case*, 8 Ch. Div. 334; *Lord Belhaven's Case*, 3 De Gex, J. & S. 54.

This disposes of the case, and we think the court properly directed a verdict for defendant.

The judgment is affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 352
81 269
68 258
87 30
68 258
124 686
68 258
836NW 66
129 1422

EBENEZER TAYLOR v. SAMUEL BUNKER, ADMINISTRATOR OF THE ESTATE OF CORNELIUS SOPER, DECEASED.

[See 53 Mich. 96.]

Evidence—Matters equally within knowledge of deceased defendant —Revival of suit—Testimony given on former trial.

1. The knowledge by third parties of facts which a plaintiff is disqualified from testifying to because equally within the knowledge of a deceased person will not remove the statutory bar to such testimony.
2. A change in the issue by the amendment of the declaration, after the revivor of a suit, will prevent the plaintiff's testifying to matters equally within the knowledge of the deceased defendant, under a claim that on a former trial both parties were witnesses, and that the former testimony of the defendant could be used as rebutting testimony by the administrator, if under *any* circumstances such a course is permissible.

Error to Jackson. (Gridley, J.) Argued January 6, 1888. Decided January 19, 1888.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

A. & C. A. Blair, for appellant.

Lewis M. Powell, for defendant.

CHAMPLIN, J. This case was before us in the January term, 1884, and is reported in 53 Mich. 96 (18 N. W. Rep. 570), under the title of *Taylor v. Soper*. The judgment was then reversed, and a new trial ordered. Since that time the declaration has by leave of court been amended. Before trial, the defendant, Soper, died, and the suit was revived and continued against Bunker, as administrator of Soper's estate.

Upon the trial of the cause, the plaintiff was sworn as a witness in his own behalf, and was interrogated as to what

Digitized by Google

occurred between himself and the defendant's intestate relative to the purchase by plaintiff from Soper, since deceased, of the Mann note. The counsel for the defendant objected, on the ground that the inquiry called for matters that were equally within the knowledge of Cornelius Soper, and, as the suit was prosecuted against and defended by his administrator, the testimony was inadmissible from this witness, under the statute. The court sustained the objection.

The plaintiff then testified, subject to objection taken by defendant's counsel, that at the time he purchased the note he was in Mr. Powell's office, and that there were present, besides the parties to the suit as originally instituted, Mr. Powell, Mr. David Soper, and Mr. Melvin Sigford. Plaintiff called as a witness Melvin Sigford, who testified that he was present when the farm was sold by plaintiff to Mr. Soper, but he heard no conversation between them.

Plaintiff also introduced as a witness in his own behalf, one Calvin Sackett, who testified to a conversation which he heard between the plaintiff and Cornelius Soper respecting the Mann note. Afterwards, the plaintiff was recalled as a witness, and asked to state the conversation which occurred between himself and Mr. Soper in Sackett's presence, and about which he testified. This was objected to as inadmissible under the statute, and excluded. These rulings of the circuit judge are assigned as error.

The circuit judge was correct. The statute enacts—

"That, when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." How. Stat. § 7545.

Counsel for plaintiff urge that the fact that other persons were present when the conversations occurred takes the case out of the operation of the statute. But this position cannot

Digitized by Google

be granted. If others were present, they are competent witnesses to prove the conversation by. The statute makes no exception, and does not allow the living party to add the weight of his testimony, when the deceased cannot be heard. The point is fully covered by *Downey v. Andrus*, 43 Mich. 65 (4 N. W. Rep. 628), where the decisions to that time are reviewed.

It is also urged by counsel for plaintiff that inasmuch as the case had been once tried in the circuit during the lifetime of Mr. Soper, and he was allowed to cross-examine the plaintiff, and testify in his own behalf, the plaintiff should be allowed to testify, and leave the defendant to introduce, in rebuttal, the testimony of Mr. Soper given upon the former trial.

These circumstances do not afford a sufficient reason for abrogating the statute. Aside from other considerations which render this proposition untenable, it must be remembered that the declaration has been amended since the former trial, so that it cannot be said that the issue is precisely the same, which, if the suggestion were permissible in any case, would render it improper in this.

The plaintiff's case being thus bereft of his own testimony to support the material allegations of his declaration, the court directed a verdict for the defendant. We do not see how he could have done otherwise. The testimony as to admissions made by defendant did not cover the vital points in controversy, and fell far short of proving the case alleged in the declaration.

No other errors are assigned, and the judgment is affirmed.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

ANDREW LINDSTRAND v. THE DELTA LUMBER COMPANY. 68 261 84 306

[See 65 Mich. 254.

Contributory negligence—Directing verdict.

This case is ruled by the former opinion, and from the plaintiff's own testimony he is held to have no right of recovery, and that a verdict was properly directed for the defendant.

Error to Schoolcraft. (Steere, J.) Argued January 11, 1888. Decided January 19, 1888.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

W. F. Riggs, for appellant.

Moore & Moore, for defendant.

LONG, J. This cause was in this Court, and argued at the January term, 1887, and an opinion handed down by Mr. Chief Justice CAMPBELL, in which all the Justices concurred, on April 14, 1887, and is found reported in 65 Mich. 254 (32 N. W. Rep. 427). The cause then came up on errors assigned by defendant, and was reversed, and remanded for new trial. In the elaborate and well-considered opinion then written in the case by Mr. Chief Justice CAMPBELL, in referring to the testimony given on the trial by plaintiff (page 263), he used this language:

"According to his own, which is the only, version of the facts, he undertook to get this piece of scantling sawed by leaning over the saw with one arm stretched out across it, so that, if he slipped, the destruction of his arm would be inevitable. Leaning forward in such a position, holding one end of the stick in each hand, there would be a sudden cessation of resistance from the saw as soon as the stick was cut

Digitized by Google

through, and the danger from any forward movement would be a danger of the worst sort. Such conduct was negligent and reckless, and the danger obvious to any one."

Not being a member of this Court at that time, I have carefully examined the record in the case as then presented, and the points then made by the attorneys in their briefs, and have carefully examined the record as it now presents the case, and the briefs presented, and am satisfied that the case now presented by the record is the same, substantially, as it appeared upon the former record. I fully concur in what Mr. Chief Justice CAMPBELL then said, and the same might be said of the plaintiff's testimony as the record now presents it. From the plaintiff's own testimony, I think he has no right to recover. The case must be ruled by the opinion of Mr. Chief Justice CAMPBELL in the case reported. The court properly directed a verdict for defendant.

The judgment is affirmed, with costs.

The other Justices concurred.

Digitized by Google

JOHN COX v. MANLY WELCHER.

68 263
s36NW 69
s13ASR 339
133 *402

Taxes—Protest—Action to recover amount paid.

1. A payment of taxes in advance of the time it can be enforced is *voluntary*, and cannot be recovered back without statutory permission.
2. Where payments are involuntary, and made under legal duress, there has never been any rule requiring a *specific* protest.
3. The attempt to compel payment where there is no legal burden is regarded as a *legal* injury, and payment made to avoid the seizure and sale of property to pay the wrongful claim may be recovered back as an extorted sum for which there was no consideration.

Error to Cass. (Smith, J.) Argued January 11, 1888. Decided January 19, 1888.

Assumpsit for drain tax paid under protest. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Lester A. Tabor, for appellant.

Howell & Carr, for defendant.

CAMPBELL, J. Plaintiff sued to recover back an illegal drain tax paid under protest to defendant, who was about to levy on his property. Defendant himself drew up the protest for plaintiff to sign, which was general, and not specific, as to reasons of illegality. The court below held the protest should have been specific, and directed judgment for defendant.

Our statutes provide that in some cases a person may pay taxes in advance of the time they can be enforced, and do

Digitized by Google

so under protest. This protest, which is made under an exceptional statute, is required to be specific. But such a payment under no stress of process is a voluntary payment, and could not be recovered back without statutory permission. Where payments are involuntary, and made under legal duress, there has never been any rule requiring a specific protest. The attempt to compel payment where there is no legal burden is regarded as a legal injury, and payment made to avoid the seizure and sale of property to pay the wrongful claim can be recovered back as an extorted sum for which there was no consideration. The principle is so familiar, under our own decisions, as to need no citation of cases. The court below did not draw the proper line between voluntary and involuntary payment. Plaintiff should have been allowed to recover.

Judgment must be reversed, and a new trial granted.

The other Justices concurred.

Digitized by Google

The Detroit & Saline Plank-road Company v. John Mahoney.

Plank-road companies—Forcibly passing toll-gate—Penalty—Evidence.

1. In a suit to recover the statutory penalty for forcibly passing a toll-gate without the payment of toll, evidence of an executory agreement between a city alderman and the directors of the toll road company to cease collecting toll on the portion of its road lying within the city limits, and to remove the gate in question, cannot be set up by the defendant as a defense.
2. The fact that a defendant thought a toll-gate which he forcibly passed was illegally maintained is no defense to a suit for the statutory penalty.

Error to Wayne. (Jennison, J.) Argued January 12, 1888. Decided January 19, 1888.

Case for penalty for illegally passing a toll-gate. Defendant brings error. Affirmed. The facts are stated in the opinion.

James H. Pound (*John W. McGrath*, of counsel), for appellant.

H. E. Spaulding (*C. A. Kent*, of counsel), for plaintiff.

Long, J. This action was brought in justice's court in Wayne county to recover a penalty provided by sections 17 and 29, chap. 96, How. Stat., being an act authorizing the formation of plank-road companies.

The declaration alleges that the plaintiff was engaged in operating a plank-road running from the city of Detroit, in Wayne county, to Saline, in Washtenaw county, in the State of Michigan, and collecting tolls due for travel thereon at a certain toll-gate by it maintained on said road in the city of

Digitized by Google

Detroit; and that on October 1, 1886, defendant, with a carriage drawn by a horse, was then and there traveling over and upon said plank-road, and was liable to pay to plaintiff certain toll by such travel, and did then and there, though requested by the plaintiff to pay the same, refuse to pay said toll, and did not pay the same, but, against the order of the plaintiff, did then and there forcibly and illegally pass through with said horse and carriage the toll-gate of the plaintiff so maintained in the city of Detroit, contrary to the statute, etc.; by means whereof, and by force of sections 17 and 29, chap. 96, How. Stat., defendant then and there became liable to pay to plaintiff the sum of, to wit, $25, etc.

Defendant pleaded the general issue, and gave notice under said plea that he would insist upon, in his defense, and offer in evidence upon the trial of said cause, that the toll-gate mentioned in plaintiff's declaration was not, at the time of the alleged grievances in said plaintiff's declaration mentioned, a legal or lawful gate, and that said plaintiff is estopped from so insisting.

The cause was tried in justice's court and appealed to the circuit, and came on for trial in the circuit court for Wayne county on the ninth day of April, 1887.

Plaintiff introduced evidence showing that plaintiff was a corporation organized under the general plank-road law of 1848; that it was in possession of the Chicago road (so called) from Detroit to Saline; that its gate No. 1 was on Michigan avenue, at the corner of Vinewood, inside of the corporate limits of the city of Detroit; and that the line of plaintiff's road commences at a point east of gate No. 1, and extends out Michigan avenue westwardly towards Saline; that on October 29, 1886, defendant came through said gate No. 1 with a horse and wagon, coming in towards the city; that, toll being demanded of him by the gate keeper, he refused to pay; that he was ordered to stop, and would not stop till he

Digitized by Google

passed through the gate, and then stopped and refused to pay, claiming that Alderman Amos told him not to pay.

Defendant then called as a witness Ferdinand Amos, and offered to show by such witness that he was one of the aldermen of the Detroit city government, and one of the committee on streets of its board of aldermen, and that, in response to an invitation from the directors of the Detroit & Saline Plank-road Company, he met them as a board of directors in their usual place of doing business; that they agreed with him that in case he was able to get for the Detroit City Railway an enlarged franchise from the Detroit city government, whereby the said railway might lay a double track on Michigan avenue, and the city of Detroit would accept the care and charge of Michigan avenue from Twenty-fifth street to the present terminus of the city upon Michigan avenue, they, in consideration thereof, would immediately cease from collecting tolls on Michigan avenue within the city of Detroit, and remove their toll-gate without the corporate limits of the said city. That, relying upon said arrangement and agreement with the board of directors, and each of them, Mr. Amos procured the desired legislation, and the city of Detroit ratified his acts in that regard; that, notwithstanding that, the Detroit & Saline Plank-road Company refused to move out its toll-gate, which it had agreed to do by this agreement, or to cease from collecting tolls on the road inside the city of Detroit; that the city of Detroit, in its corporate capacity, in every respect complied with the agreement tendered by the board of directors of the Detroit & Saline Plank-road Company to the city of Detroit through this witness, and passed this legislation upon the statements of Mr. Amos to its legislative and executive departments of the city, and fully performed the agreements upon its part to be performed. The giving of such testimony by the defendant was objected to by plaintiff as incompetent, and was excluded by the court, to which ruling the

Digitized by Google

defendant excepted. Witness then testified that he advised defendant not to pay toll at that gate.

Defendant, being called as a witness in his own behalf, testified that he was a resident and tax payer in the city of Detroit; that it was not his intention to force the gate, but not to recognize it, as he understood it to be illegal.

The parties having rested their case, defendant requested the court to charge the jury:

"1. If the jury find that the defendant in good faith, believing the plaintiff had no right to charge toll, refused to pay the toll demanded, relying upon the information received by him, then plaintiff is not entitled to recover.

"2. The jury in assessing damages, if they believe the defendant in good faith refused the payment of the toll demanded by plaintiff's agents on the ground 'that they had no right to exact the same of a citizen within the city of Detroit,' may not assess any damages against defendant if they think this case is not one for the imposition of a penalty, as a penalty can never be incurred except where a party defiantly and knowingly incurs it."

These requests were refused by the court, and the court charged the jury as follows:

"It is not denied but that the defendant did go through this gate without authority, and that he refused to pay the toll. Now, gentlemen, I charge you that, under this act, he did forcibly and illegally pass this gate, and refuse to pay and that he comes within the penalty. * * * That penalty is a sum not exceeding twenty-five dollars. * * * It is for you to say what that sum shall be; you must be the judges."

The jury having found a verdict for plaintiff, and judgment being entered thereon, the defendant brings error.

There are several assignments of error, but they all relate to the refusal of the court to permit defendant to introduce the testimony offered, the refusal by the court to give defendant's requests in his charge to the jury, and the charge of the court that the defendant did forcibly and illegally pass the plaintiff's gate, and did thereby incur some penalty, and in

Digitized by Google

directing the jury to find some amount of penalty against defendant.

The offer by the defendant to show the agreement made by Alderman Amos between the directors of the plaintiff and the city government of Detroit, for the use of the Detroit City Railway, was properly excluded by the court. It is not pretended that the company ever surrendered its right to take toll in the city, or removed its gate beyond the city limits. The contract offered to be proven was not made by plaintiff with defendant, and he could not set up such an agreement in his defense. The plaintiff had a right to demand toll of the defendant at the gate in advance of his actually traveling upon its road, and the facts admitted clearly show that the defendant is liable to the penalty for forcibly and illegally passing plaintiff's gate, as given by section 17 of the plank-road act of March 18, 1848. *Plank-road Co. v. Fisher*, 4 Mich. 43.

The fact that defendant thought the gate illegal is no defense. He intended to pass the gate without paying toll, which plaintiff had a right to demand.

The case was properly submitted to the jury by the court, and the defendant's requests properly refused. We see no error in the case as presented upon this record. The case is therefore affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. MORSE, J., did not sit.

Digitized by Google

68 270
68 274
68 270
108 674
68 270
120 538
120 689
68 270
143 1365
68 270
157 89

JOHN ZABEL AND JOSEPH HARMON v. LEVI A. HARSHMAN, DRAIN COMMISSIONER.

[See *post*, 278.]

Equity pleading—Demurrer clause in answer—Hearing—Bill to restrain construction of drain.

1. Our practice does not permit a separate hearing on a demurrer clause in an answer to a bill in chancery, and it ought not to be granted.
2. A bill by land-owners who have valuable rights in a drain of several years' standing, and which affords a sufficient water escape for their lands and those of adjacent proprietors, as well as the public highways it crosses, alleging that the drain commissioner is about to lay out and contract for the construction of a drain on substantially the same route as the old one, and communicating with it at both ends, and that it will in no way benefit the complainants, who will be assessed for its construction, and charging further that the defendant has lands which will be benefited by the new drain, and that he fraudulently procured a petition to be presented to him for its construction, makes out a case of equity which should be heard on the facts.

Appeal from Monroe. (Joslin, J.) Argued January 13, 1888. Decided January 19, 1888.

Bill filed to restrain the construction of a drain. Complainants appeal from a decree dismissing the bill on a hearing on a demurrer clause in the answer. Reversed, and case remanded for further proceedings. The facts are stated in the opinion.

Grosvenor, Bragdon & Grosvenor, for complainants.

Ira G. Humphrey and *C. A. Golden*, for defendant.

CAMPBELL, J. Complainants file their bill to restrain the defendant as town drain commissioner of Summerfield,

Digitized by Google

in Monroe county, from proceeding to complete a drain. The bill, in substance, sets out that both complainants own valuable farms traversed and drained by a drain or ditch, several miles long, known as the "Stacy Drain," made as a county drain about 17 years ago, and of which they built at an expense to Zabel of about $350, and to Harmon and the previous owners of part of his land of not far from the same amount, and this old drain is and has been a great convenience, and sufficient water escape for their land, and that of the other adjacent owners, as well as the public highways it crosses or passes.

It further sets out that defendant has land that would be benefited by the proposed new drain, and that he fraudulently procured a petition to be presented to him for the construction of a new drain communicating with the old drain at both ends, and in the same direction, substantially, and has taken steps to lay it out and to let contracts for it; that it will in no way benefit complainants, who will be assessed for it, Zabel one-tenth of the entire cost, and Harmon about five and a half per cent. The proceeding is claimed to be both illegal and fraudulent.

The defendant put in an answer partly denying the bill. This answer contained a demurrer clause, to the effect that there was an adequate remedy at law, and a general denial of jurisdiction.

A replication was filed, and defendant demanded a hearing on proofs in open court. On the hearing the circuit judge refused to hear proofs, and dismissed the bill.

This practice was wrong. Unless a regular demurrer is filed, our practice does not permit a separate hearing on the demurrer clause, and it ought not to be granted. In case the circuit court is in error it necessitates delay and a double hearing after appeal. If a defendant is not willing to risk his case on demurrer, it is much better to let it proceed on the facts, when, if the bill is originally more or less

Digitized by Google

defective, amendments can be allowed in furtherance of justice.

In the present case the bill, in our opinion, makes out a case of equity which should be heard on the facts. The two complainants are affected in the same way, and apparently to a very serious extent,—not merely by an assessment to build a ditch which does them no good, but also by an interference with an old water-course, which cost them a good deal of money, and is valuable. The bill must be taken as true on this hearing, and, if so, the drain is a regular county drain. But whether so or not, it is an old drain, which they have rights in just as valuable, whatever its origin may have been.

There is no remedy at law which would protect them completely. And the bill charges fraud in the defendant in covering up a scheme for his own benefit. The truth of this can only be determined by testimony, but it is an element which may possibly be important.

Upon the bill, had it been demurred to regularly, we think enough appears to authorize further examination. The hearing ought to have been completed on proofs.

The decree must be reversed, and the case remanded for further proceedings.

The other Justices concurred.

Digitized by Google

68 273
108 674
68 273
114 335
68 273
148 664

JOHN ZABEL AND JOSEPH HARMON v. LEVI A. HARSHMAN, DRAIN COMMISSIONER.

[See *ante*, 270.]

Drains—Jurisdiction of township commissioner—County drain—Officers de facto.

1. A township drain commissioner has no jurisdiction to locate a township drain upon the line of a drain laid by the county drain commissioners, unless such first drain has been legally vacated or abandoned. *Tomlin v. Newcomb*, 70 Mich.——(38 N. W. Rep. 315).

2. The action of county drain commissioners, who assume to act as such, and are at least officers *de facto*, as far as it falls within the authority conferred upon such officers, is not open to collateral attack.

   So *held*, where two of the three commissioners composing the board were members of the board of supervisors which appointed them, and the record of their proceedings showed a want of notice to parties interested of the application to the judge of probate for the appointment of commissioners to ascertain the necessity for the drain, which objections would be fatal if urged by an interested party prior to the construction of the drain and the completion of the necessary proceedings therefor.

3. A township drain commissioner, before proceeding to construct a drain, must obtain a release of the right of way and of damages, or a condemnation of such right of way, and the compensation therefor must be ascertained.

4. A drain located, established, and constructed by county drain commissioners under color of the statute, and its cost and expense having been paid for by the parties assessed without objection as to any illegality or irregularity in the proceedings, and having been in use and acquiesced in as a public drain for 15 years or more, must be regarded and recognized by the township drain commissioner as a public drain, duly and legally established.

Appeal from Monroe. (Kinne, J.) Argued February 1, 1889. Decided April 12, 1889.

Digitized by Google

Bill filed to restrain the construction of a drain. Complainants appeal from decree dismissing bill. Decree reversed and one entered granting relief prayed for. The facts are stated in the opinion.

Grosvenor, Bragdon & Grosvenor, for complainants.

Ira G. Humphrey and *C. A. Golden*, for defendant.

CHAMPLIN, J. This case was before us upon demurrer to the bill of complaint at the January term, 1888 (*ante* 270), when the demurrer was overruled, and the cause remanded for proofs.

The bill of complaint states, and the proofs show, that in 1868 the county drain commissioners of Monroe county laid out a drain in the town of Summerfield, in said county, some four or five miles in length, passing through lands owned by complainants, for which they were assessed, and that the drain so established was constructed and has been in use as a public drain since 1870 or 1871, and known and called the "Stacy Drain;" and that complainants and others drain into this public drain, and are greatly benefited thereby.

That in 1886 the defendant, as drain commissioner, acting upon an application to locate and establish a drain in the township of Summerfield, proceeded to locate and establish a drain upon the northern part of the Stacy drain, namely, from its northern terminus to the north line of complainant Harmon's land, and upon the identical line of the Stacy drain.

The bill of complaint also charged that defendant was disqualified from acting because he owned land that was assessed for benefits when the Stacy drain was constructed, and was drained into it; and it charged that his action for that reason was fraudulent.

The proof shows that, in order to remove the disqualification, he sold 10 acres off from a portion of the west side

Digitized by Google

of his land before he received and acted upon the application, but his testimony shows that the cellar of his house is drained into the Stacy drain. There is a tile drain from his cellar to the highway, and thence a ditch connects with the Stacy drain. The facts need not be stated at large in order to reach a conclusion.

The undisputed facts bring the case directly within the principle of law laid down in *Tomlin v. Newcomb*, 70 Mich. —— (38 N. W. Rep. 315), which holds that a township drain commissioner has no jurisdiction to locate a township drain upon the line of a drain laid by the county drain commissioner, unless such first drain was legally vacated or abandoned. In this case the Stacy drain laid by the county drain commissioners was neither vacated nor abandoned, but had been in constant use for more than 16 years, and its public character had been disputed by no one.

The court below dismissed the bill of complaint, because it appeared from the proof that in 1884 the then township drain commissioner, acting upon the theory that the Stacy drain was a legal drain, instituted proceedings to clean out, deepen, widen, or extend the same, and the complainants, with others, filed their bill, and obtained an injunction restraining the drain commissioner from further action, and, on hearing, a decree was granted perpetually enjoining the commissioner from further proceeding, and hence the complainants are estopped by that decree, which was entered February 14, 1884; the learned judge stating that the grounds of the bill in that case and of the decree were that the Stacy drain was not a legal drain, and the proceedings to lay it out were illegal and void, and they could not complain if the defendant had proceeded upon the same theory, and treated the Stacy drain as illegal and void.

The files of the case alluded to were introduced in evidence in this suit, from which it appears that a bill of complaint was filed December 16, 1882, by complainants, with others,

Digitized by Google

setting up that the township drain commissioner had taken steps to locate, establish, and construct a drain in the township of Summerfield to be called the "Stacy Drain," and claimed to have established and located said drain according to a survey, and describing the route thereof, and had applied to the probate court for the appointment of commissioners.

The bill sets up certain irregularities in the assessment, particularly in assessing only half of the amount to be raised in one year; that contracts were let, and some of them were awarded to complainants, and that a minor son of the drain commissioner was also awarded a contract through higher lands than those of complainants, that could be done sooner than the wet and marshy portion they had contracts for; that some of the lands were non-resident, and would require a long time to realize the tax assessed against them; and that in consequence they would be postponed to the son of the commissioner in getting their pay.

The bill also alleged that the proceedings were defective in not giving a proper description of the lands proposed to be taken, and that the entire line was made up of an uncertain line, without giving any width or depth or *data* from which the land taken could be described. Other reasons were alleged why the proceedings were illegal.

The prayer of said bill is as follows:

"That the said Jerome Trombley, treasurer and collector as aforesaid, his attorneys, counselors, solicitors, officers, and agents, may be restrained and enjoined by the order and decree of this court from collecting and receiving any and all taxes placed upon the assessment and tax roll of said Summerfield, now in his hands, which are assessed and taxed against the lands of your orators, and of all other persons which are so assessed and taxed, for the benefit of said Stacy drain, and for the establishment, locating, and constructing the same; and that the levy, and all the proceedings for assessing such taxes for said drain, so far as the same has now been had, may be declared by this court to be irregular, illegal, and void, and of no force and effect.

Digitized by Google

"And that by like order and decree of this court the supervisor of said town of Summerfield who shall hold said office at the time of extending the taxes on the assessment roll of said township in the year A. D. 1883 may be directed and required to place upon said roll the full amount of taxes apportioned and charged for the locating, establishing, constructing, and maintaining said Stacy drain, and charge and extend the same on said roll against the several pieces of land against which the same are charged and apportioned by the report of said drain commissioner in relation to said drain, a copy of which has been served upon said supervisor. Or in default thereof, and of said decree, that the entire proceedings for establishing, locating, constructing, and excavating said drain may be declared to be irregular, illegal, and void, and that the same may be set aside, quashed, and held for naught.

"And that your orators may have such other relief and such further relief in the premises as the nature of their case may require, and as shall be agreeable to equity and good conscience."

It will be observed that there is nothing whatever in this bill of complaint referring in the remotest manner to the Stacy drain which had been laid out and established by the county commissioners. Nothing is said about its being an application to widen or deepen an existing drain, but the application and proceeding was to locate, establish, and construct a drain to be called the "Stacy Drain."

After certain proceedings were had under this bill of complaint, and on August 14, 1883, the complainants in that bill filed the following petition, namely:

"Your petitioners, Elbridge G. Goodrich, Thomas H. Leach, John Zabel, and Joseph Harmon, respectfully show to the court that they are a part of the above-named complainants, who heretofore, to wit, on the sixteenth day of December, 1882, filed their bill of complaint in this cause against the above-named defendants, to obtain certain relief as in said bill prayed, in relation to a certain drain called the 'Stacy Drain,' more particularly described in said bill, which relief to a certain extent was granted by this court by an interlocutory decree and order signed and entered in said cause on the twentieth day of February, A. D. 1883, and by

Digitized by Google

a further order and decree made and entered therein March 10, 1883, reference to which orders and decrees is hereby made.

"And your petitioners allege that they are still willing and anxious to have said Stacy drain constructed and completed as the same is laid out, and are also still willing to perform and complete their contracts for the excavation thereon, and to pay the taxes assessed upon them for said drain, if the same can be done so as to bring about and complete said drain as intended. But certain difficulties have arisen and have come to the knowledge of your petitioners since said bill was filed, which difficulties threaten to defeat their equities as set forth in said bill, and even to entirely prevent and defeat the construction of said drain, to the great and manifest injury of your petitioners, and of all others interested in said drain, and to result in great pecuniary loss and damage to your petitioners, and to others interested.

"Your petitioners have discovered that the proceedings of the township drain commissioner of the township of Summerfield (who is one of the defendants in said bill of complaint) to lay out, establish, and construct the Stacy drain as set forth in said bill was in truth and in fact a proceeding to widen and deepen a Stacy drain which had been heretofore laid out and constructed by a county drain commissioner of Monroe county, and which drain is by the statute placed under the charge of said county drain commissioner and his successors in office, and not within the jurisdiction of said township drain commissioner, so that said proceeding of said township drain commissioner was irregular and unauthorized.

"The one-half only of the taxes for the construction of said drain was levied upon the assessment roll for the year 1882, leaving one-half of said tax to be levied in 1883, some part of which tax of 1882 has been paid, for a part notes have been given under the order of this court, and a part has been returned unpaid. Whether, under the statute as construed by this court, the township drain commissioner will cause the remaining one-half of said tax to be levied in 1883, your petitioners cannot say.

"If said commissioner does not determine to cause such remaining half to be levied, there is no power to compel him to do so, if his proceedings for imposing said tax are illegal; and, if he does take steps to cause said tax to be levied, the collection may be resisted, if the tax is illegally imposed. So that in either event said remaining half of said tax is not

Digitized by Google

likely to be collected in full. This being apparent, and the entire amount of said tax being necessary to pay for the construction of said drain under the contracts as awarded, the contractors will hesitate to perform their several contracts so long as their compensation is uncertain, so that a part of said contracts, at least, are not likely to be performed.

"If your petitioners proceed to complete their several contracts as made, there is a fair chance that they will not receive full compensation therefor. At any rate, if their contracts are fulfilled, and other contracts are not performed, a portion of said drain will be completed, while other parts will not be touched. In that situation said drain can benefit no one, and will result in a useless waste of money and labor, besides creating a nuisance prejudicial to public health, by confining pools of water in the completed parts of said drain to stagnate and generate miasma.

"In this contingency your petitioners are unable to determine what course is wise for them to take, although desirous to secure said drain by paying the taxes and fulfilling their contracts in good faith. They have good reason to believe, and do believe, that said drain will not be completed in full, or to an extent sufficient to make it of any material benefit to any of the persons taxed for its construction. The entire proceedings to lay out, establish, and construct said drain being illegal, a tax for its construction may be successfully resisted by any person interested, and, although your petitioners are willing to fulfill on their part, they would be entirely powerless to compel others interested to acquiesce in the proceeding, so that their own action would avail nothing.

"Wherefore, in consideration of the premises, and of all the difficulties surrounding this case, your petitioners pray the court, as in and by their said bill they have, with their co-complainants, already prayed, that the entire proceeding for locating, establishing, constructing, and excavating said Stacy drain may be declared by the order and decree of this court to be irregular, illegal, and void, and that the same may be set aside, quashed, and held for naught; and that the notes, which your petitioners and their co-complainants were required to give by and under the order and decree of this court, may be ordered and decreed to be restored to your petitioners and their co-complainants; and that your petitioners may have such other relief, and such further relief, in the premises, as the nature of the case may require, and as shall be agreeable to equity."

There is nothing in this petition that attacks the validity

Digitized by Google

of the Stacy drain, as laid out by the county drain commissioners; but the petition asserts the invalidity of the proceedings by the township drain commissioner because he was attempting to widen and deepen an existing drain under an application to locate and establish a new one.

On February 14, 1884, the Hon. Chauncey Joslin, circuit judge, entered a decree in that cause, adjudging that the proceedings of the township drain commissioner were irregular, illegal, and void, and setting the same aside. He further decreed a perpetual injunction against collecting the tax assessed as charged against any and all lands for the construction of the drain. He then stated his reasons as follows:

"The injunction in this case is sustained for the following reasons:

"1. Because in the attempt for the county commissioners to lay out the Stacy drain the land was condemned by commissioners appointed by the probate court without notice to the parties in interest, so that they were never authorized to pay the condemnation, and for that reason the drain never had any legal existence, and was only a private ditch like other ditches dug by one or more citizens by themselves.

"2. The present proceedings by the township drain commissioner were without legal authority, as there was no petition to lay out and establish a new drain, and no legal condemnation of the land for such a drain, there having been no original proceedings,—no public drain.

"3. It does not appear in the petition that the petitioners were freeholders."

It is quite likely that the decree made in that cause was right, but it could not affect the Stacy drain, which had been established and constructed by the county drain commissioners. The validity of that drain was not at issue, and its legality was not questioned. It had been constructed and acquiesced in for more than 14 years. There is nothing in those proceedings or in that decree to estop the complainants from relying upon the legal existence of the Stacy drain.

The only thing that appears in the proofs in this case to

Digitized by Google

affect the validity of the action of the county drain commissioners, which at that time consisted of a board composed of three persons, is that two of them were supervisors when they were appointed drain commissioners by the board of supervisors. It is also claimed that the proceedings of the county drain commissioners, introduced in evidence by the complainants, show upon their face that no notice was given to parties interested of the application to the judge of probate for the appointment of three commissioners to ascertain the necessity for such drain, and to appraise the damages, and it was for the latter reason that Judge Joslin declared the proceedings to be void. And it is claimed that the proceedings of the drain commissioners were void because two of them were supervisors when they were appointed.

Had the proceedings of the county drain commissioners been assailed by any party interested before the drain was constructed, and the assessments therefor raised and paid over, and the whole proceedings completed, on the ground above set forth, they could not have been sustained. But no one interested complained, so far as this record shows, but the drain has been built and the proceedings acquiesced in for more than 15 years. The county drain commissioners assumed to act as such, and they were at least officers *de facto*, and their action within the scope of the authority conferred upon county drain commissioners, is not open to collateral attacks.

In the suit which culminated in the decree of February 14, 1884, the existence of the Stacy drain came in only incidentally and collaterally, and, as before stated, its legality was not questioned in the pleadings.

The second reason given by the judge, so far as it stated that there was no petition to lay out and establish a new drain, is evidently based upon an error of fact. The record shows that the petition was to lay out and establish a new drain, as appears from the bill of complaint in that case; and

Digitized by Google

the petition afterwards filed by complainants, and set out above, states that under such petition the town drain commissioner was in fact proceeding to deepen and widen the Stacy drain, and the complaint was that the town drain commissioner had no authority to do so. I cannot see that complainants have taken inconsistent positions in regard to the county drain, and certainly they cannot be estopped by wrong reasons given for a right decree in their former suit. Their position in that suit with respect to the county drain was the same as it is in this, namely, that it was an existing established drain.

If the contention of defendant that the old Stacy drain is simply a private ditch is correct, his action as drain commissioner cannot be justified in letting contracts to construct a new drain, and making assessments therefor. Before he can do this he must obtain a release of the right of way and damages, or a condemnation of such right of way, and the compensation must be ascertained. He has not done this, and his action in letting contracts and making assessments to defray the expense and cost of construction is without authority of law, and the complainants would have a right to an injunction against further proceeding until such right of way is obtained.

As we view the case presented by this record, the main controversy is whether the Stacy drain laid out and constructed under the county drain commissioners is illegal and unauthorized, or whether it must be regarded by all parties, including the public, as an existing established drain. In the one case proceedings may be taken to establish a new drain, and in the other they may be taken to deepen or widen or both.

The question as to whether or not the Stacy drain, as established by the county drain commissioners, is an established drain existing for the benefit of the public, subject to the law as to widening or deepening, or is merely a private ditch, is properly raised by this record, and calls for our

Digitized by Google

decision. We think that, it having been located, established, and constructed under color of the statute, and the cost and expense paid for by the parties assessed without objection as to any illegality or irregularity, and having been in use and acquiesced in as a public drain for 15 years or more, it must be regarded and recognized by the township drain commissioner as a public drain, duly and legally established.

The decree of the circuit court must be reversed, and a decree entered here in accordance with the prayer of the bill, with costs of both courts to complainants.

The other Justices concurred.

HENRY ZINK, DRAIN COMMISSIONER, v. THE BOARD OF SUPERVISORS OF MONROE COUNTY. 68 283 / 138 548

Drains—Authority of commissioner to employ counsel and clerical assistance—Board of supervisors—Rejection of charges.

1. A township drain commissioner is not authorized to employ an attorney to assist him in the performance of his duties at the expense of tax payers, and a charge for expenses thus incurred is properly rejected by the board of supervisors under sections 3 and 4 of chap. 6 of Act No. 227, Laws of 1885.
2. If a township drain commissioner employs clerical assistance in the performance of his official duties, the necessity for such work must appear before it can be charged for, and such charges must be brought within the statutory limits before they can be held to be lawfully authorized; and in the absence of such showing such charges are properly rejected by the board of supervisors.

Application for *mandamus* to compel respondent to convene, and authorize the assessment of a drain tax. Submitted

Digitized by Google

January 13, 1888. Denied January 19, 1888. The facts are stated in the opinion.

Ira G. Humphrey, for relator.

C. A. Golden, prosecuting attorney, for respondent.

SHERWOOD, C. J. This is an application to this Court for a writ of *mandamus*, requiring the respondents—

"To convene, and order to be raised by tax, in the township of Exeter, in said county of Monroe, the entire sum of $2,008 upon the lands, and in accordance with the drain special assessment roll of Swan Creek drain in said township, and that such other order may be had in the premises as justice may require."

The relator shows by his petition that as drain commissioner, in the summer and fall of 1886, he laid out, established, and constructed a drain in the township of Exeter, about six miles long, according to law; that he, not being familiar with the requirements of the statute upon the subject, sought and obtained the services of a lawyer to give him proper directions in the discharge of his duties in the premises, and also employed two persons to make copies of the necessary papers in the matter, who performed such service, and did some other needed work in laying out the drain.

That for laying out, establishing, and constructing such drain, and the costs and expenses therefor, he made a special assessment roll, assessing upon the several descriptions of land contained therein $2,008; and that among the items composing this sum were the fees of the attorneys he employed to assist him, to the amount of $70, and also $72 for the services of the other two persons employed by him.

That the costs and expenses of said drain, including the last two items mentioned, were audited and allowed by the township board; and that the assessment roll was by the clerk of the town laid before the supervisor, who presented

Digitized by Google

it to the board of supervisors of the county at their October session in 1887, properly certified to, to be approved and levied for said drain, and that said board deducted from said roll $60 of the said attorneys' fees, and $72 for the charges of the other two persons, and ordered the balance to be assessed as costs and expenses of the drain.

The respondent demurs to the petition.

The petitioner claims—

1. That the board of supervisors had no authority to review the proceedings of the township board in auditing and allowing the items rejected; that their allowance or disallowance was a matter within the discretion of the township, and not subject to review.

2. That the drain commissioner was a township officer, and that the board of supervisors have no authority to audit, allow, or review the accounts of such officers the discharge of whose duties are confined within the limits of the township; that it was the duty of the board of supervisors, when they found the proceedings regular, and according to the statutes, in constructing said drain and making the assessment roll, and that the same were properly certified to the board, to have ordered the amount to be raised upon said special assessment roll.

The record raises the single question, were the rejected amounts such as are authorized to be raised by law? If they were, they should have been ordered assessed and collected; if not, the action of the board of supervisors was proper.

The board of supervisors must determine whether or not the taxes upon the roll appear to be authorized by law, and, if they err in such determination, it is the privilege of the person injured to have the error corrected.

We think, however, the board of supervisors did not err in the action complained of. The drain statute (Act No. 227, chap. 9, § 3, Laws of 1885) contains this provision:

"It shall be the duty of the Attorney General to draft, or cause the same to be done under his supervision, a complete set of all the blank forms that may be used or required under the provisions of this act; and it shall be the duty of the

Digitized by Google

Secretary of State to publish a sufficient number of copies of this act in pamphlet form, with an annotation of Supreme Court decisions, and an index thereto, and an appendix containing a copy of all such blank forms."

It evidently contemplates, with these forms before him, the commissioner will possess the necessary information to discharge his duties without further aid; and there is no provision of the statute authorizing him to employ the assistance of attorneys or counsel, at the expense of the tax payers, in the special assessment roll.

In regard to the charges made for the employment of the other persons named for writing, this may or may not have been in doing the necessary work in laying out, establishing, and completing the drain; but when such work is necessarily done by another than the commissioner, not only the necessity for it must appear before it can be charged for, but the charges must be brought within the limits prescribed by statute before they can be held to be lawfully authorized. These things were not made to appear before the board of supervisors, and their action must be sustained in regard to them.

The motion for *mandamus* will therefore be denied, and the petition of the relator dismissed, with costs.

The other Justices concurred.

Digitized by Google

68 287
75 549
68 287
70 59
68 287
73 494
68 287
86 195
68 287
108 688
68 287
110 577
68 287
117 123
68 287
f122 283

ISAAC ALTMAN ET AL. v. FREDERICK RITTERSHOFER.

Bills and notes—Stipulation for payment of attorney's fees—Negotiability.

1. A written promise to pay a certain sum of money at a fixed date, "and attorney's fees," is not a promissory note.
2. The certainty requisite to the negotiability of an instrument must continue until the obligation is discharged, and any provision which before that time removes such certainty prevents the instrument being negotiable at all.

Error to Bay. (Green, J.) Argued January 13, 1888. Decided January 19, 1888.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Simonson, Gillett & Courtwright, for appellants.

T. A. E. & J. C. Weadock, for defendant.

LONG, J. It is conceded that, unless the written instrument upon which suit is brought is a negotiable promissory note, the plaintiffs cannot recover. It reads as follows:

"$130. BAY CITY, MICHIGAN, October 17, 1885.

"Six months after date I promise to pay to the order of M. Cohn one hundred and thirty dollars, at the Bay National Bank of Bay City, Mich., for value received, without any relief whatever from valuation or appraisement laws; with eight per cent. interest from date until paid, and attorney's fees. FREDERICK RITTERSHOFER."

The instrument is indorsed "M. Cohn."

A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer, or to a person therein designated or his order.

Digitized by Google

The only question upon the negotiability of this instrument is whether the words "and attorney's fees" added thereto render the *sum* to be paid *uncertain.*

This precise question has been passed upon by the courts of many of our sister states, and we are aware that there is much conflict of opinion upon the point; some of the courts holding that the stipulation to pay attorney fees relates merely to the remedy, and that an instrument may be negotiable if the amount with which it may be discharged at maturity be fixed and certain, even though the amount required to discharge it after it has passed maturity, or recoverable upon it in an action, be entirely indefinite and uncertain. *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433; *Gaar v. Banking Co.*, 11 Bush, 180; *Stoneman v. Pyle*, 35 Ind. 104.

Courts of some of the other states have held to the same doctrine. In the case of *Jones v. Radatz*, 27 Minn. 240 (6 N. W. Rep. 800), the supreme court of Minnesota held the following not a negotiable promissory note:

"$135. ST. PAUL, September 7, 1878.

"Three months after date we, or either of us, promise to pay to H. K. White & Co., or bearer, $135, payable at the Second National Bank of St. Paul, Minnesota, for value received, with 12 per cent. interest per annum from date, and reasonable attorney's fees, if suit be instituted for the collection of this note.

(Signed) "_____."

Chief Justice Gilfillan, in this case, said:

"The instrument before us has this certainty as to the $135, and the interest. But the whole instrument must be taken together. The promise to pay the $135 and interest is not the whole of the promise,—not the entire obligation created. The entire promise and obligation is to pay absolutely that sum and interest, and in a particular contingency, to wit, the bringing suit by the payee after default, to pay a further amount not fixed, and not capable of being ascertained from the instrument itself."

Digitized by Google

And, in speaking of the suggestions in some of the cases that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, he says:

"For the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency."

The supreme court of Pennsylvania, in the case of *Woods v. North*, 84 Penn. St. 407, held the following instrument not to be a negotiable promissory note:

"$377. HUNTINGDON, PENNSYLVANIA, May 5, 1875.

"Sixty days after date I promise to pay to the order of W. H. Woods, at the Union Bank of Huntingdon, three hundred and seventy-seven dollars, and five per cent. collection fee if not paid when due, without defalcation, value received.

"SAMUEL STEFFEY."

Indorsement, "W. H. Woods."

In this case Justice Sharswood said:

"In the paper now in question there enters, as to the amount, an undoubted element of uncertainty. * * * If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions, and litigation result."

In *Cayuga Bank v. Purdy*, 56 Mich. 6 (22 N. W. Rep. 93), this Court held the following not a negotiable promissory note:

"366.66. COLDWATER, MICHIGAN, February 27, 1883.

"On the first day of November, 1883, we, the undersigned, whose post-office address is Algansee, county of Branch, and State of Michigan, jointly and severally, for value received, promise to pay E. M. Birdsall & Company, or order, three hundred sixty-six 66-100 dollars, with interest at seven per cent. per annum, if paid when due; if not so paid, then the interest shall be ten per cent. per annum from date. We also agree to pay exchange and all expenses, including attorney's fee, incurred in collecting, payable at the First National

Digitized by Google

Bank in Coldwater, Mich. We do hereby relinquish and waive the benefits of all laws exempting real and personal property from levy and sale, and all benefit or relief from valuation and appraisement laws.

"GEORGE R. PURDY.
"ELNATHAN GEORGE."

Mr. Justice CHAMPLIN in this case says:

"The modern tendency to interpolate into such instruments engagements and stipulations not recognized by the law merchant, affecting the certainty as to the amount due and payable thereon, or the time of maturity, * * * should be discountenanced, and held to destroy their negotiability, and deprive them of the character of promissory notes, and they should be relegated to the domain of ordinary contracts."

We see no good reason to depart from this principle. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and that any provision which before that time removes such certainty prevents the instrument being negotiable at all. *First Nat'l Bank v. Bynum*, 84 N. C. 24 (37 Amer. Rep. 605); *Maryland, etc., Co. v. Newman*, 60 Md. 584 (45 Amer. Rep. 750); *Garretson v. Purdy*, 3 Dak. 178 (14 N. W. Rep. 100); *Stevens v. Johnson*, 28 Minn. 172 (9 N. W. Rep. 677). These cases and many others which we have examined uphold this principle.

I have carefully examined the authorities cited in plaintiffs' brief, and note the argument made by plaintiffs' counsel in the brief, but cannot accede to the doctrine for which they contend. The better reasoning, in my judgment, holds such instruments non-negotiable. The direction of the court to the jury to return a verdict for defendant was correct.

Judgment is affirmed, with costs.

The other Justices concurred.

Digitized by Google

68 291
f153 675

MICHAEL STEFFES v. CHARLES G. MORAN AND RALPH PHELPS, JR.

Public wrongs—Manner of redress—Bill by tax payer to enjoin payment of claim allowed by board of supervisors.

Public wrongs must, in this State, be redressed by the people's public agents, and not by private intervention. The case of *Miller v. Grandy*, 13 Mich. 540, laid down the Michigan doctrine on this subject, with its reasons, and has been adhered to.

So *held*, where a tax payer filed a bill to restrain a county treasurer from paying over to one of the auditors of Wayne county certain moneys allowed him by the board of supervisors for the expenses of various legal proceedings, complainant's share of the tax necessary to pay said sum not amounting to $100.

Appeal from Wayne. (Jennison, J.) Argued January 13, 1888. Decided January 19, 1888.

Bill by tax payer to restrain payment by county treasurer of money allowed a claimant by the board of supervisors. Complainant appeals from a decree dismissing his bill on general demurrer. Affirmed. The facts are stated in the opinion.

James H. Pound, for complainant.

Weeks & Berry, for defendant Moran.

CAMPBELL, J. Complainant brought his bill, as a tax payer, to restrain defendant Phelps, who is treasurer of Wayne county, from paying over to defendant Moran certain moneys allowed him by the board of supervisors for the expenses of various legal proceedings. The bill claims that he never performed the services, and also that the supervisors acted

Digitized by Google

without jurisdiction. A general demurrer was filed, and the bill dismissed.

It is not necessary to consider how well or ill founded the claim may be as set out in the bill. Complainant only seeks relief on the ground that, as a tax payer, he is entitled to complain of any diversion of public funds. His tax is but a small fraction of the sum in question; amounting, at most, to a few cents.

Under such circumstances, it is the settled law of this State that he cannot assume the functions of a redresser of public grievances. If his burdens would be increased to a sum large enough to come within the jurisdiction of equity, he would have some claim to redress on a sufficient case. But public wrongs must, in this State, be redressed by the people's public agents, and not by private intervention. The case of *Miller v. Grandy*, 13 Mich. 540, laid down the Michigan doctrine on this subject, with its reasons, and has been adhered to. It is not necessary to rediscuss it.

The bill was properly dismissed, and the decree must be affirmed.

The other Justices concurred.

Digitized by Google

68 293
68 300
68 302
68 293
77 396
68 293
87 31
68 293
104 157
68 293
111 451
68 293
115 353

CHARLES HILLMAN v. JOHN C. SCHWENK.

[See *post*, 297, 301.]

Witness—Testimony as to matters equally within knowledge of deceased person—Evidence—Cross-examination—Credibility of witness—Charge to jury.

1. In a suit by the holder of a note purporting to be indorsed *in blank* by a deceased payee, the fact that a *devisee* of the payee urges the defendant to defend on the ground that the indorsement is a forgery, and indemnifies him against loss in so doing, will not disqualify the plaintiff as a witness in his own behalf, Act No. 139, Laws of 1885, not being applicable to such a case.
2. In a suit by an indorsee involving the alleged forged indorsement of a promissory note, claimed to have been secured after its purchase, the plaintiff cannot testify who told him to procure such indorsement; nor can it be shown on his cross-examination that the indorser had money to loan at the time of his death, and that plaintiff filed a claim against his estate; but he can be asked if he had the pocket-book of the deceased after his death, he having testified on his direct examination that the note was kept in said book, and the defense claiming that he purloined it therefrom on the day the indorser died.
3. While an instruction to a jury that they are under no obligation to believe *any* of the testimony of a witness who swears falsely as to *one* material fact is technically correct, it is safer to further instruct them, in the same connection, that the credibility of *such* a witness is exclusively a question for them, and that there is no rule of law which prevents their giving him credit as to such portions of his testimony as they believe to be true and credible.

Error to Berrien. (Smith, J.) Argued January 4, 1888. Decided January 26, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Spafford Tryon and *Edward Bacon*, for appellant.

Digitized by Google

William H. Breece (*Clapp & Bridgman*, of counsel), for plaintiff.

SHERWOOD, C. J. This is an action of assumpsit upon a promissory note made November 4, 1882, by John C. Schwenk and Barbara Schwenk, his wife, to John Weigers, for $200, payable in two years from date, with interest at 6 per cent. The interest is indorsed paid, the last indorsement being in 1885. The note was drawn to the payee or order, and appears to have been indorsed by him.[1] The declaration was upon the common counts, and the plea the general issue, with notice that defendant would show, upon the trial, that Mrs. Schwenk signed the note as surety for her husband, and never received any consideration therefor, and that it did not relate to her separate property, and, further, that the note was never indorsed by John Weigers to the plaintiff, nor was the note ever transferred to him. The defendant's notice was supported by his affidavit.

The plaintiff yielded to the facts claimed on behalf of the wife, and, on motion, discontinued as to her, amending the declaration accordingly, and proceeded to the trial before a jury, and obtained a verdict for the amount of the note, upon which judgment was rendered.

Upon the trial, the defendant sought to show that the payee's indorsement of the note was a forgery. The jury, however, found otherwise.

At the time of the trial, John Weigers, the payee named in the note, was dead. By his will, he had left a part of his estate to one Carl Wolff, who urged defense to be made to the note in question, and gave a bond to the defendant indemnifying him against all costs by reason of his defending the suit, and said Wolff took an active part in making the defense. The defendant's counsel objected to the

[1] The indorsement reads, "John Weigers. X"

Digitized by Google

testimony of the plaintiff relating to the purchase of the note from Weigers, because the facts were equally within the knowledge of the latter, and that the defense was being made in the interest of Wolff.

The defendant claimed that he was protected against this by How. Stat. § 7545, as amended by Act No. 139, Laws of 1885. We do not think the statute invoked applies to a case like the present, and this objection was properly overruled.

The only issue of fact in the case was whether or not the note in suit was the property of the plaintiff, or the property of Weigers when he died. The plaintiff's testimony shows that John Weigers died on the twelfth of April, 1886, and he claims that he purchased the note of Mr. Weigers in January previous. The plaintiff gave testimony of his purchase of the note, and of the circumstances under which he obtained Mr. Weigers' indorsement of the same, which he claimed to have secured some little time after he made the purchase. In this part of his testimony the witness was asked:

"Who told you, and how came it, that you ought to have Mr. Weigers' name on the note?"

This was objected to as "immaterial and hearsay." The objection was well taken, and the evidence should have been excluded.

On the cross-examination of this witness, defendant's counsel sought to prove that Mr. Weigers, at the time of his death, had money to loan. This testimony was properly excluded by the court. Also the fact that the witness put in a claim before the commissioners against Weigers' estate was irrelevant, and rightly excluded.

The witness was asked the following question by defendant's counsel upon his cross-examination: "Did you have his pocket-book after his death?" The plaintiff had been permitted to testify that Mr. Weigers kept the note in question in his pocket-book, and it was the claim of the defendant

Digitized by Google

that Weigers had the same therein until after his death, and that the plaintiff took the same therefrom on the day that he died. The answer to this question was excluded, as not proper cross-examination. This was clearly error. So long as the plaintiff had been allowed to testify how he obtained the note on his direct examination, a cross-examination upon that subject, tending to show that he did not get it by purchase, but by purloining from the pocket-book, should have been permitted.

We find nothing in the rulings of the court upon the testimony offered needing further consideration, except that relating to the statements of the plaintiff to Dolphin about his purchase of the note, and the statements of the witness Taylor to the plaintiff as to what ought to be done with the notes. This was hearsay, and should have been excluded.

The only exceptions to the charge relate to the following clauses:

"1. During the trial of a case, if a witness swears to a matter willfully false in your belief, you are under no obligation to give him any credit for anything else that he says.

"2. If you come to the conclusion that any witness has deliberately told you that which is not true in the matter, then you are under no obligation to believe him in anything he may say in any other respect."

These charges are technically correct, and error cannot be successfully maintained upon them. We still feel it our duty to say that, when it becomes the duty of the court to give the jury instructions upon the subject, it should be done in such manner as to render it improbable that the jury should misapprehend the correct rule, and it would have been better and safer if the court had, in immediate connection with the clauses excepted to, said to the jury:

"The credibility of the witness, under such circumstances, is exclusively a question for the jury, and there is no rule of law which prevents their giving credit to such a witness as to such

Digitized by Google

portions of his testimony as they believe to be true and credible." *People v. Jenness*, 5 Mich. 305; *Knowles v. People*, 15 Id. 409; *Fisher v. People*, 20 Id. 135; *O'Rourke v. O'Rourke*, 43 Id. 58 (4 N. W. Rep. 531); *Mercer v. Wright*, 3 Wis. 645; *Morely v. Dunbar*, 24 Id. 183; *Chicago v. Smith*, 48 Ill. 107; *Martin v. People*, 54 Id. 225; *C. & A. R. R. Co. v. Buttolf*, 66 Id. 347.

For the errors stated, the judgment will be reversed, and a new trial granted.

CHAMPLIN and LONG, JJ., concurred with SHERWOOD, C. J.

MORSE, J. I concur in the result.

CAMPBELL, J., did not sit.

CHARLES HILLMAN v. JOHN C. SCHWENK AND DANIEL MILLER.

[See *ante*, 293, *post*, 301.]

Executors and administrators—Title to personalty of deceased—Testimony as to matters equally within knowledge of deceased person.

1. The title of the testator's personal property vests in the executor for the purposes of administering the estate, and, if he neglects his duty in collecting and obtaining possession of the assets, the law affords the devisees and legatees a remedy, but it will not permit them to represent the estate in the prosecution or defense of suits.
2. In a suit against the maker by the holder of a promissory note purporting to be indorsed *in blank* by a *deceased* payee, which indorsement is claimed to be a *forgery*, if the executor indemnifies the defendant, or takes upon himself the defense of the suit, the plaintiff will be disqualified from testifying to matters equally within the knowledge of the deceased payee.
3. The remaining questions involved in this case are decided in *Hillman v. Schwenk*, *ante*, 293.

68 297
68 309
68 297
87 24
87 30
68 297
104 157
68 297
113 405
68 297
120 410

Digitized by Google

Error to Berrien. (Smith, J.) Argued January 4, 1838. Decided March 2, 1888.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Spafford Tryon and *Edward Bacon*, for appellants.

William H. Breece (*Clapp & Bridgman*, of counsel), for plaintiff.

CHAMPLIN, J. The plaintiff brought this suit to recover the amount of a paper writing as follows:

"NEW BUFFALO, MICH., Oct. 12, 1881.

"One year after date we promise to pay to the order of John Weigers three hundred dollars, per value received, with interest at the rate of 7 per cent. per annum from date; and it is agreed that, if the interest is not paid when due, it shall be added to the principal of this note, and bear the same rate of interest. JOHN C. SCHWENK.

"DANIEL MILLER."

Indorsed: "JOHN WEIGERS. X"

Interest was also indorsed as paid up to and including 1885.

The declaration was upon the common counts, with copy of the instrument annexed.

The plea was the general issue, with a notice that John Weigers never indorsed to the plaintiff, and never transferred to said plaintiff, the note; that it never was the property of the plaintiff, but was the property of John Weigers, the payee in the note named, until his death, in April, 1886, and thereafter belonged to the executor or administrator of John Weigers' estate.

On the trial it was agreed between the parties that the note was made and given by the defendants—John C. Schwenk as principal, and Daniel Miller as surety—to John Weigers for borrowed money.

Digitized by Google

"That said John Weigers died testate in said county on the twelfth day of April, 1886; that in the probate court of said county his will was duly probated, and Albert Kelling appointed administrator with the will annexed; that by said will, after some unimportant bequests, said John Weigers left his estate to be divided equally,—one-third to Frederick Hillman, the plaintiff's father; one-third to August Hillman, the plaintiff's uncle; and one-third to Carl Wolff, Sr.

"And it was further agreed by the parties that the only question in this suit was whether or not the plaintiff, within the last year of the life of the said John Weigers, purchased from him said note, and thereby became the owner thereof; in other words, whether said note, at the commencement of this suit, was the property of said plaintiff, or was the property of the estate of said John Weigers.

"That the testimony upon said trial showed that the defendants in this suit had received from said Carl Wolff a bond of indemnity against all trouble, loss, and expense in defending this suit; and that Carl Wolff, by reason of his interest under the will aforesaid, had taken upon himself the entire defense of this suit, and was making such defense. The defendants, in consideration of the premises, allowed him, in their names, to make all the defense in this suit.

"And the counsel for said plaintiff, to maintain and prove the said issue on his part, produced as a witness the said plaintiff, Charles Hillman, and showed to said witness the note aforesaid, with its indorsements as they appear in the declaration, and also another note, of which the following is a copy:

"'$200. NEW BUFFALO, MICH., November 4, 1882.

"'Two years after date we promise to pay to the order of John Weigers two hundred dollars, for value received, with interest at the rate of 6 per centum per annum from date; and it is agreed that, if the interest is not paid when due, it shall be added to the principal of this note, and bear interest at the same rate of interest.

"'JOHN C. SCHWENK.

"'BARBARA SCHWENK.'

There being pending in this court another suit by said plaintiff against the makers of said note for collection thereof."

While it was competent for the defendants to impeach the plaintiff's title in the note, and to agree upon that as the sole question in the case, such agreement would not bind the

Digitized by Google

executor of the estate, as he was not a party to it, and did not take upon himself the burthen of the defense.

The title of the testator's personal property vests in the executor for the purposes of administering the estate; and, if the note in question in reality does belong to the estate of John Weigers, the executors would not be bound by a judgment in this case in the plaintiff's favor. If the executor neglects his duty in collecting or obtaining possession of the assets of his testate, the law affords to the devisee and legatees a remedy, but the law does not permit a devisee or legatee to represent the estate in the prosecution or defense of suits.

If the executor had indemnified the defendants, or had taken upon himself the defense of the suit, the statute excluding the plaintiff from testifying to matters which were equally within the knowledge of the deceased would have applied; but, as the legatee does not represent the deceased person while there is an executor, the statute does not apply.

The suit last above mentioned was brought to this Court, and an opinion by the Chief Justice was filed therein upon the twenty-sixth day of January, 1888. (See *Hillman v. Schwenk, ante,* 293.) The material errors assigned in this case are the same as those passed upon in the opinion filed; and for reasons therein stated the judgment in this case must be reversed, and a new trial ordered.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

CHARLES HILLMAN v. JOHN C. SCHWENK, IMPLEADED WITH BARBARA SCHWENK.

68 301
87 24
68 801
115 853

[See *ante*, 293, 297.]

Evidence—Witness—Administrator assuming defense of suit—Indorsement of note—Forgery.

This case is ruled by the former opinion (*ante*, 293), to which reference is had.

Error to Berrien. (O'Hara, J.) Argued October 11 and 12, 1888. Decided November 28, 1888.

Assumpsit. Defendant brings error. Reversed and new trial *denied*. The facts are stated in this and the former opinion.

Safford Tryon and *Edward Bacon*, for appellant.

William H. Breece (*Clapp & Bridgman*, of counsel), for plaintiff.

SHERWOOD, C. J. This suit is upon the common counts in assumpsit, with notice that a note is relied on for recovery, given by the defendants to John Weigers for the payment of the sum of $200 in two years from date, with interest at 6 per cent., and, if not paid when due, the interest is to be added to the principal, and both to draw interest until paid. The note is dated November 4, 1882, and made payable to the order of Weigers. The interest is indorsed paid to 1885.

Defendants pleaded the general issue, with notice they would show that the note was never indorsed by Weigers to the plaintiff, and was never transferred by the former, neither was it ever the property of the plaintiff, but was the property of Weigers until he died, and thereafter belonged to

Digitized by Google

his administrator or executor; that Barbara Schwenk before and at the time the note was given, and ever since, has been the lawful wife of John C. Schwenk; that she never received any consideration for the note, and signed the same as surety, and that, as against her, it is void.

The case has been twice tried in the circuit. On the first trial the plaintiff had judgment, which was reversed in this Court on error, and a new trial ordered (68 Mich. 293, 36 N. W. Rep. 77). Such trial has been had, and the plaintiff has again recovered. The record brings before us a bill of exceptions containing all the evidence.

A similar case between this plaintiff and one of these defendants and Mr. Miller, involving substantially the same considerations as in this, was before this Court, and by us decided shortly before the last trial (68 Mich. 297, 36 N. W. Rep. 670). In accordance with the opinion given in that case, the administrator of John Weigers' estate, it seems, has deemed it his duty to take upon himself the defense of this suit upon the second trial, and allowed it to proceed in the names of the original parties, and upon the same pleadings as before, but has indemnified the defendants against the costs thereof. This fact was called to the attention of the circuit judge, and the indemnifying bond was filed with the papers in the case. Otherwise the record is substantially the same as that formerly before us, and presents the same questions of law.

Upon a re-examination of these, and an inspection of the record, we think the views *then* taken of the case were correct, and that the judgment should be again reversed, and that a new trial should *not* be granted.

The other Justices concurred

Digitized by Google

68 308
68 390
68 400
68 458
68 303
77 491
68 303
81 199
68 308
95 513
68 303
98 559
68 303
114 290
68 303
e135 481

JESSE B. SUTTON v. CHARLES S. BECKWITH.

Promissory note — Consideration — Contemporaneous agreement — Good-faith purchaser—Bohemian-oat contract—Evidence—Estoppel.

1. In a suit by the purchaser of a promissory note before maturity, but with knowledge that its *real* consideration was the agreement of a so-called Bohemian oat association to sell $800 worth of oats for the maker before calling for payment of the note, testimony that the maker, after giving the note, took the initiatory steps towards joining another association of the same kind, can have no possible bearing upon the issue, and should be rejected.

2. In answer to the contention that the admission of such testimony was error without prejudice, as, there having been no breach of the agreement at the time of the purchase of the note, it could not be robbed of its negotiability, and the plaintiff was entitled to recover, the only defense being the non-performance of the agreement, the Court, while reversing the judgment for the erroneous admission of said testimony, *held*, further, as follows:

   a—An agreement made at the time of the execution and delivery of a promissory note, to be performed *before* its maturity, and forming its *real* consideration, is a part of the transaction, and, as between the parties, its performance is a condition precedent to the enforcement of the note; and a purchaser of the note before maturity, and before a breach of the agreement, but who has seen it, and is acquainted with its relation to the note, is bound the same as if the agreement was attached to the note or written upon the same piece of paper.

   b—A maker who says to a proposed purchaser of his note that it is all right, and that he will pay it at maturity, is estopped, after its purchase in reliance upon such statement, from asserting a failure of consideration, or pleading any other invalidity against the note.

Error to Branch. (Pealer, J.) Argued January 5, 1888. Decided January 26, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Digitized by Google

Barlow & Loveridge, for appellant.

Milo D. Campbell, for plaintiff.

MORSE, J. On the first day of March, 1885, the defendant executed and delivered to one George Cole, of Dundee, Michigan, the following promissory note:

"400. March 1, 1885.

"One year after date I promise to pay to W. H. Elson or bearer four hundred dollars, value received, with 7 per cent. interest per annum.

"CHARLES S. BECKWITH."

At the time this note was given, 40 bushels of Bohemian oats, at a called price of $10 per bushel, were then and there delivered by said Cole to the defendant. Cole gave back, at the same time, the following agreement to the defendant:

"ALGANSEE TOWNSHIP, BRANCH COUNTY, }
STATE OF MICHIGAN. }

"We do hereby agree to sell 80 bushels of Bohemian oats for Charles Beckwith, at $10 per bushel, on or before the twenty-fifth day of January, 1886. The note given by Charles S. Beckwith to W. H. Elson will not be called for until the above amount is sold at $10 per bushel.

"JO. R. STRAYER."

The plaintiff brought suit upon this note in the circuit court for Branch county. The defendant pleaded the general issue, with a notice that the note was given upon the express consideration as set forth in said agreement or bond; that the note was in fact given to the Michigan Bohemian Oat Association, and that the bond entered into and was a part of the transaction of the giving of the note, and, in fact, the principal part of the consideration of the note; that it was distinctly agreed that said note should not be called for until said association had sold 80 bushels of Bohemian oats, at $10 per bushel, for the defendant; that neither said association nor said Jo. R. Strayer, nor any person, sold the said 80 bushels of oats for the defendant, and that, in

Digitized by Google

fact, the consideration of said note to that extent has failed.

That the plaintiff had full and perfect knowledge of all the matters above set forth before he purchased said note, and had notice of the want of consideration therefor, and purchased such note, if he purchased it at all, with full knowledge thereof; also that defendant would show an entire failure of consideration for said note, of which the plaintiff had notice.

The plaintiff had judgment for the full amount of the note, and interest. The evidence established the fact that, before the purchase of the note by the plaintiff, he sent his cashier or agent to see the defendant, who informed the said agent of the circumstances of the giving of the note, and showed him the bond.

The plaintiff gave evidence tending to show that afterwards, and before he bought the note, the defendant came into his place of business, and said to him:

"The note is all right. I gave the note, and I suppose I am good for it, and I shall pay it when it is due."

This was denied by the defendant.

The terms of the bond were never performed, but at the time the plaintiff purchased the note there had been no breach of the bond or agreement, as the time of its performance was yet several months away. At the time of the commencement of this suit the defendant held the bond against Strayer.

The principal error assigned is upon the admission of certain testimony having a tendency to show that, after the execution of this note, the defendant took initiatory steps towards joining and becoming a member of a Bohemian oat association other than the one purporting to give the bond or agreement in this case.

This testimony was objected to as being incompetent, irrelevant, and immaterial. We think the testimony should have been rejected. It could have no possible bearing upon the issue involved. It may have, and probably did, work in

Digitized by Google

the minds of the jury a prejudice against the defendant.

The counsel for plaintiff argues that, admitting that the admission of this evidence was erroneous, yet it could have done the defendant no harm, because the plaintiff, upon the undisputed facts, was entitled to a verdict in any event; that the rejection of this evidence, or striking it out of the case, would not have changed the result, as the plaintiff without it was entitled, as a matter of law, to a verdict in his favor.

The counsel insists that, there being no breach of the bond or agreement at the time he became the owner of the note, and purchasing it before due, the instrument could not be robbed of its negotiability, and the plaintiff was entitled to recover, the only defense being upon the bond, and that it had not been fulfilled. He cites a large number of authorities to sustain his position. Many of the cases so cited are not applicable to the state of facts existing in this case. The principal cases tending to support his claim are *Adams v. Smith*, 35 Me. 324; *Kelso v. Frye*, 4 Bibb, 493; *Dow v. Tuttle*, 4 Mass. 414; and *Bank v. Cason*, 39 La. Ann. 865 (2 South. Rep. 881).

In *Adams v. Smith*, the note in suit was made to the Protection Insurance Company of New Jersey or order. Upon the face of the note were the words "No. Brig Cushnoc." The note was given for a policy of insurance upon the brig Cushnoc, and the policy received for the same contained this stipulation:

"In case of loss, such loss to be paid in thirty days after proof of the loss and of interest in the assured, the amount of the note given for the premium being first deducted."

The defendant offered to prove that the brig was his property; that the note was given for insurance upon her; that she was lost within the life-time of the policy, and before the pay-day of the note; that he had taken the necessary and prerequisite steps to prove and perfect his claim; that his

Digitized by Google

claim under the policy exceeded the amount of the note; and that the stipulation in the policy was known to the plaintiffs at the time of its indorsement to them.

The court hold that the defense was not admissible;—

"That the note was the property of the insurance company, unpaid and negotiable, and having been transferred to the plaintiffs in the ordinary course of business, by indorsement before its maturity, they are entitled to recover the amount due upon it."

No reason other than this is given for the decision.

In *Kelso v. Frye* the note was given for a clock, and a writing, under the hand of the company selling the clock, was executed at the same time as the note, and delivered to the purchaser, warranting the clock, and containing a promise that, if the clock should not prove good, the company would either make it good or replace it by a good one. The evidence of this writing was rejected, upon the ground that the performance of this agreement or stipulation could not be construed as a condition precedent to the payment of the note, and that a breach of it must form the basis of a separate action; that the sale of the clock, and not the performance of the stipulation, was the consideration of the note. Whether or not the assignee or holder of the note had notice of this stipulation does not appear in the report of the case.

The case of *Dow v. Tuttle* is the nearest to the present case of any cited upon plaintiff's brief. There the defendant offered to show that, at the time of the making of the note, it was agreed between the promisor and promisee, and was the condition on which the note was given, that payment should not be demanded until the expiration of five years, and that the promisee would not sell or part with the note. The defendant also offered to read to the jury the following paper, signed by the promisee:

"These lines may certify that I, the subscriber, agree with

Digitized by Google

James Tuttle to wait on him for the money due me till he turns his property to the best advantage."

This paper was dated February 15, 1804, and the note February 16, same year. Defendant offered to prove that this writing was made and signed at the same time with the note, and constituted part of the same contract; that the plaintiff was present, and had full knowledge of all the agreements aforesaid. The evidence was rejected. The agreement offered, outside of the written paper which I have quoted, seems to have rested in parol.

The supreme court of Massachusetts, in passing upon the case, do not refer at all to the paper writing, but say that—

"The agreement * * * is not to be considered as a part of the contract with the note. That [the note] is a promise to pay to the promisee or his order, a sum of money in one year. If the agreement was a part of this contract, it would be repugnant to the note and destroy its effect. The agreement, although made at the same time, must be considered as a collateral promise of the promisee, for a breach of which, if there be a legal consideration, an action would lie. In chancery, it would be a sufficient ground for an injunction against the plaintiff, proving his knowledge of it before he purchased the note. And at law, perhaps, it may support a motion to stay proceedings, by granting imparlances, until the plaintiff could put it in suit consistent with the agreement. * * * As we consider the agreement as collateral to the note, the evidence was properly rejected."

The editor of the report, in a note to the case, says:

"From the evidence it seems that the two paper writings should, between the original parties, and between the maker and an assignee with notice, have been treated as parts of one entire transaction."

This note agrees, as will be seen hereafter, with the decisions of our Court, and seems to me to be sound doctrine.

In *Bank v. Cason* the consideration of the note was admitted to be lawful and valuable. At the time the plaintiff became the holder of the note there had been no failure of the consideration.

Digitized by Google

The defense to the note was that it was given as collateral security for plantation supplies, to be furnished the defendant for the year by the payees of the note; that shortly after its execution, and when only a small part of the supplies had been furnished, the payees failed; that other parties succeeded the payees in the same business, and that ultimately, by the shipment of cotton, the defendant's account for supplies, which the note was given to cover, was fully paid; and that the consideration of the note was known to the bank at the time it became the holder of the note. The note was transferred to the bank before maturity, and for value. The question presented was whether such knowledge on the part of the bank deprived it of the right to recover on the note. When the bank acquired the note the consideration had not failed, and the contract between defendant and the payees was being executed, and part of the supplies had been advanced. The court say:

"If the consideration be lawful, the knowledge of that consideration can of itself have no bearing on the rights of the transferee. * * * It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that from some contingency it *may* never be enjoyed."

There are other authorities tending in the same direction, and to the same effect, of these four cases above noted.

But none of the cases that I have examined seem to meet the circumstances of this case. It is evident that the consideration of the note in suit was not the 40 bushels of oats, at $10 per bushel, but the agreement or bond executed and delivered at the same time as the note. The transaction, as a whole, appealed to the cupidity of the maker. He was to receive $800 for 80 bushels of oats before he was to pay $400 for the 40 bushels delivered to him. This agreement was what he acted and relied upon, and formed the consideration of his note. He would never have given it for the 40 bushels of oats independent of the promise in the bond. The oats he

Digitized by Google

received cut but little figure in the dealing in the mind of the defendant.

Nor was this agreement or bond a collateral undertaking. It was executed at the same time as the note, and a part of the same transaction.

These two papers, so executed, must be taken and construed together. They formed one contract, and, between the original parties to the note, could not be enforced until the agreement was performed. It has been well settled, in this State and elsewhere, that several instruments made at one and the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together for the purpose of showing the true contract between the parties. *Singer Mfg. Co. v. Haynes,* 36 Mich. 385; *Smith v. Van Blarcom,* 45 Id. 371 (8 N. W. Rep. 90); *Dudgeon v. Haggart,* 17 Id. 273; *Eberts v. Selover,* 44 Id. 519 (7 N. W. Rep. 225); *Chapman v. Colby,* 47 Id. 46, 51 (10 N. W. Rep. 74); *Bronson v. Green,* Walk. Ch. 56; *Makepeace v. College,* 10 Pick. 298, 302; *Jackson v. McKenney,* 3 Wend. 233.

The negotiation of the note by the payee to the plaintiff was a fraud upon the maker, and nothing but the negotiable quality of the note, as it appeared standing alone, could deprive the defendant of his defense, of his right to show the whole contract of which it was only a part. *Smith v. Van Blarcom,* 45 Mich. 373.

If the plaintiff had been a good-faith holder of the note, with no knowledge of the bond, he would have been entitled to recover, because of the negotiable form of the note.

But if he purchased the note before due, and before the time of performance stated in the bond, with the agreement attached to it and forming a part of the contract, he would be obliged, under the law, to take the note as qualified and controlled by the bond or agreement. And if he saw the bond before he purchased the note, and was acquainted with

Digitized by Google

its relation to the note, he must be considered as bound by it, the same as if it had been attached to the note, or written upon the same piece of paper. The bond not having been performed, the consideration failed, and the plaintiff could not recover, unless the jury believed his claim that the defendant came to him, or saw him, and told him the note was all right, and he would pay it when it became due. If the defendant said this, or its equivalent, to the plaintiff, he would be estopped, after the plaintiff had bought the note relying upon this statement, from afterwards asserting a failure of consideration, or pleading any other invalidity against the note.

For the erroneous admission of testimony heretofore noted, the judgment of the court below must be reversed, with costs, and a new trial granted.

CHAMPLIN and LONG, JJ., concurred.

SHERWOOD, C. J. I agree with my Brother MORSE that the judgment in this case should be reversed. And were the case one in which the rules governing the law merchant might be invoked, I should agree in most that he has said in the case.

The contract under consideration was a gross fraud from the beginning to the end, and, on the part of the parties procuring it, was even worse,—it was criminal in character,—and furnishes no case for the application of the just and equitable principles underlying and controlling commercial law, and to attempt to apply them to a case like this is a perversion of the doctrine; and an appeal to the adjudicated cases establishing this doctrine is only giving colorable dignity to one of the worst swindles perpetrated upon the present generation, and should be treated by all courts as such.

The transaction is one wherein the intention to cheat and defraud is apparent to all upon the face of the contract

Digitized by Google

sought to be enforced, except to the ignorant and unsuspecting, and, in my judgment, is against public policy and void. If there were any doubt upon this subject, the recent legislation in this State making the transaction a felony should be regarded as conclusive.

Certain it is that no person owning and holding or having knowledge of the entire contract can be considered as a *bona fide* holder of the paper, and it is questionable whether a holder of any part of the contract should be so regarded.

The judgment should be reversed, and no new trial should be granted.

CAMPBELL, J., did not sit.

68 312
80 163
80 454
68 312
88 305
68 312
91 159
68 312
99 492
68 312
106 236
106 548
[illegible]12
[illegible] 7
68 312
114 34
68 312
c153 572

MARY C. LEONARD v. CHARLES BEAUDRY ET AL.

Contract for furnishing saw-mill with logs—Breach—Loss of profits—Measure of damages.

1. In a suit by a mill-owner for the non-delivery of logs under a contract for their manufacture, the measure of damages is the difference between the cost of manufacture and the contract price.
2. Where a claim is made for damages arising from a breach of contract, and evidence is offered to show loss of profits which might have been realized from its performance, the question to be determined is whether the damages claimed are too conjectural, speculative, or contingent to form a safe basis for estimating the damages.
3. Where a contract is executory, and the time for its performance has expired, and the elements out of which the profits were to arise can be ascertained and proved with reasonable certainty, and especially where the compensation is fixed by the contract, there is no reason why the difference between the cost of performance and compensation agreed upon should not be recovered

Digitized by Google

as *actual* damages suffered by the aggrieved party by its violation, whether they be called gains prevented or loss of profits.

4. The declaration in this case is held to state a cause of action.

Error to Muskegon. (Russell, J.) Argued January 11, 1888. Decided January 26, 1888.

Assumpsit for breach of sawing contract. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

Bunker & Carpenter, for defendants.

CHAMPLIN, J. This action was brought to recover damages for a breach of contract. The declaration alleged, by way of inducement, that plaintiff was the owner of a steam saw-mill in the township of Laketown, which was fitted with a band-saw and all the appliances necessary for its proper operation, well equipped, in good working condition, and capable of cutting 30,000 feet of pine lumber per day.

The plaintiff then alleges that on the first day of March, 1886, the plaintiff made and entered into a contract with defendants, whereby they agreed to furnish and deliver at her mill in the spring of 1886, as soon as her mill was ready for operation, 1,000,000 feet of pine saw-logs suitable for sawing on band-saws, to be sawed into lumber on said band-saw for defendants, and to pay plaintiff for sawing the same three dollars for each thousand feet for merchantable and short lumber, and two dollars a thousand feet for culls; all of said logs to be so delivered prior to the first day of July, 1886.

That, in consideration thereof, the plaintiff promised and agreed to and with the said defendants to receive said logs, and to manufacture the same into lumber upon said band-saw as soon as delivered as aforesaid, according to the capacity of said saw.

Digitized by Google

That the plaintiff's mill was, to wit, on the tenth day of May, 1886, ready for operation, whereof defendants had due notice; and the plaintiff was then and there, during the sawing season of 1886, ready and willing to have accepted said logs, and to have sawed them on said band-saw, whereof said defendants had notice; yet the defendants did not nor would at said time, nor during said sawing season of 1886, or at any time since, deliver, or cause to be delivered, said logs, or any part thereof, or any other logs whatsoever, but, on the contrary, wholly refused so to do, and in consequence thereof the plaintiff has been deprived of sundry great gains and profits which she might and would have acquired to herself by sawing said logs as aforesaid.

That after the making of said contract she made and entered into a contract with H. C. Akeley for the sawing and manufacture of logs into lumber on said band-saw during the remainder of said sawing season of 1886 not needed by her for the performance of said contract made by her with the defendants as aforesaid, and the logs delivered to her by said Akeley, together with those which said defendants had agreed to furnish by their said contract, were sufficient to stock said mill, and to keep said band-saw in full operation, during the whole of said sawing season of 1886; and that the plaintiff, relying on said contract and agreement of defendants, and for the purpose of holding and keeping herself ready and able to perform said contract on her part, declined and refused to enter into other contracts for the sawing of logs on said band-saw during said sawing season for said year, which were, after the making of said contract and prior to the opening of the sawing season for said year, offered and tendered to her, and by means of which she would have been able to run and operate said band-saw continuously during said sawing season of 1886 to its full capacity, at a great profit.

That after the refusal of said defendants to furnish and

Digitized by Google

deliver said logs as aforesaid, and as soon as she learned that the said defendants would not furnish them, she made diligent endeavors and exertions to obtain other suitable logs for sawing on band-saws, to cut and manufacture into lumber at her said mill on said band-saw, and that she was unable to obtain them; and that by reason of defendants' failure and refusal to furnish and deliver said logs as aforesaid, and her inability to obtain other logs to be cut in their place, said plaintiff was obliged to and did run said mill and operate said saw at a loss in cutting inferior logs, not suitable to be cut upon a band-saw, but which were the best logs she could obtain for that purpose for a long time, to wit, three weeks and upwards; and for another long space of time, to wit, two weeks and upwards, said mill was compelled to lie idle, and said plaintiff was compelled, during said time, to pay out large sums of money as wages to her employés while waiting for said logs to be delivered by defendants, and while the mill was lying idle,—all to plaintiff's damage $3,000.

A bill of particulars of plaintiff's demand was filed, as follows:

1886.

"August 1. Actual loss sustained by plaintiff in running mill and cutting logs inferior to those to be furnished by defendants	$500.00
"August 1. Loss of actual profits plaintiff would have made for 3 weeks while cutting inferior logs	500.00
"August 1. Loss of actual profits plaintiff would have made while mill was lying idle by reason of defendants' failure to furnish logs	500.00
"August 1. Cash paid by plaintiff for employés' wages while mill was lying idle by reason of defendants' failure to furnish logs	500.00
"August 1. Loss of actual profits plaintiff would have received in manufacturing lumber from one million feet (board measure) of logs contracted to be delivered to her by said defendants for sawing, had said logs been so delivered in accordance with the agreement of said defendants, at $1.50 per M	1,500.00

"Interest at 7 per cent. on each item.

"*Dated April* 14, 1887."

Digitized by Google

The defendants pleaded the general issue.

The cause was tried at the Muskegon circuit before Hon. F. J. Russell, circuit judge, and a jury, at which time the following proceedings were had: After the jury was impaneled, the counsel for the plaintiff made an opening statement to them as follows:

"*Gentlemen of the Jury:* The plaintiff, by her proof, will endeavor to show that during the spring of 1886, and before the commencement of the sawing season of that year, the plaintiff, through her agent and representative on the one side, and the defendants on the other, entered into a contract, by the terms of which the defendants agreed to deliver at the plaintiff's mill, which is situated on the north side of Muskegon lake, one million feet of logs, to be sawed by the plaintiff by what is known as a band-saw; that the plaintiff was to receive the logs, and manufacture them into lumber, for which the defendants were to pay three dollars ($3.00) per thousand feet for the merchantable and short lumber made from the logs, and two dollars ($2.00) per thousand feet for the culls.

"That at the time they were negotiating to make this contract, and at the time it was made, it was known and understood by the parties to it that, in order for the plaintiff to prepare to do this work,—to receive and saw these logs,—it would be necessary for her to arrange to have the sawing of a quantity of her own logs, with which her mill was supplied, done by other parties; and that, soon after entering into this agreement with the defendants, the plaintiff had a million feet or more of her own logs sawed elsewhere; that the plaintiff was all the time willing and ready to perform the contract on her part, but that the defendants neglected to perform it on their part, and never delivered any logs.

"We will show that a profit would have accrued to the plaintiff in doing the work bargained to be done at the time named, and at the contract price, had the logs been delivered in accordance with the agreement; that it may reasonably be supposed to have been in the contemplation of both parties to the contract, at the time they made it, that the plaintiff's mill would have to lie idle, or operate without any profit, in case the defendants made a breach, and failed to deliver the logs.

"Now, we will undertake to show that arrangements by log-owners and by mill-men for sawing by the thousand are

Digitized by Google

made in the winter and spring of the year, and before the commencement of the sawing season, so that the owner of a mill making contracts for the receipt and sawing of logs for others, in case of a breach of that contract, can very seldom, if at all, obtain a stock after the sawing season has fairly begun; that the plaintiff has been prevented from making the profit which she would have made on this work solely by reason of the neglect of the defendants to deliver their logs in accordance with the terms of the agreement.

"We will show that, as soon as this neglect on the defendants' part became known to the plaintiff, she used all reasonable diligence in endeavoring to procure stock elsewhere with which to operate her mill, but, for the reasons which I have stated, she was unable to procure a stock with which to operate her mill all the time, and she could not procure the quantity and kind of logs contracted to be delivered by the defendants, but was able only to procure a small quantity, comparatively, and of a poorer quality; that she operated her mill upon this poorer quality of logs for the purpose of keeping the men together, endeavoring to make a profit,—endeavoring to lose as little as possible by reason of the violation of the contract on the part of the defendants,—but in operating her mill upon this poorer class of logs (the best she could obtain), instead of making a profit, she really operated at a loss, so that, during all the time it would have required her to perform her contract with the defendants, her mill was either idle, or was being operated without any profit.

"That the plaintiff's inability to procure logs after the neglect of the defendants became known was something that might naturally and reasonably have been expected by the contracting parties, because they live here, and know that arrangements of the kind are always made in the spring of the year. Our measure of damages, as we claim, will be (in case you find there has been a contract and a breach of it on the part of the defendants) the difference between what it would have cost the plaintiff to do the work and the contract price; making reasonable deduction for the less time engaged, and for the release from the care, trouble, risk, and responsibility attending a full execution of the work."

And the counsel for the said plaintiff, to prove and maintain the said issue on her part, called Phillip P. Leonard, who, being duly sworn, testified as follows:

Digitized by Google

"*Q.* Where do you live?

"*A.* In the city of Muskegon."

Defendants' Counsel (*Mr. Bunker*). "I desire, at this time, to object to the introduction of any testimony under the bill of particulars in this case, and the claim made by the counsel for the plaintiff in his opening statement to the jury, for the reason that there can be no recovery under the same."

The Court. "I will sustain the objection."

To which ruling and decision so made the counsel for the said plaintiff, in behalf of said plaintiff, did then and there except

"*Counsel for plaintiff.* In addition and in support of the statements made in opening the case, we will offer to prove that contracts between mill-owners and log-owners are made in the winter and spring of the year before the commencement of the sawing season, and that, after the commencement of the sawing season in each of the years from 1867 to the present time, it has been impossible to contract for stock to saw by the thousand; and that all parties to this contract understood that these arrangements are made before the commencement of the sawing season, and that the natural result of a breach of the contract on the part of the defendants would be that the plaintiff's mill would have to lie idle, and that it would be impossible for her to procure stock after their breach upon which her mill could be operated with profit.

"We offer to show that the cost of manufacture by the plaintiff was $56.75 per day, including the wear of the mill, machinery, belts, saws, and files, and all repairs to the mill; that the receipts to the plaintiff from operating her mill under this contract would have been, per day, $3.00 per thousand feet for twenty-five thousand feet of merchantable lumber, $3.00 per thousand feet for one thousand feet of short lumber, and $2.00 per thousand feet for twenty-five hundred feet of culls; from pickets, $6.00; from slabs, $2.25,—or a total of $91.25, or an actual profit of $1.38 on each thousand feet of logs, making a total of $1,380.00 on one million feet; from which we admit a reasonable deduction should be made for the less time engaged, and for the release from the care, trouble, risk, and responsibility attending a full execution of the contract on the part of the plaintiff.

"That during a portion of the time necessary to have per-

Digitized by Google

formed this contract by the plaintiff (had the logs been delivered in accordance with the agreement of the defendants), the mill was compelled to lie idle, during which time the plaintiff was under expense for a portion of her help which was employed by the season.

"That, during another portion of the time that would have been required to perform the contract, the mill was operated upon logs of a poorer quality,—so poor that the mill yielded only about ten thousand feet per day of merchantable lumber; that plaintiff procured them at the lowest price she could procure them for, and sold her lumber at the highest price she could obtain; that she was unable to procure any other logs to saw, and that she actually sustained a loss in sawing this poorer quality of logs.

"That, when the breach of this contract became known to her, she visited all the log-owners who supply the mills at Muskegon with logs, endeavoring to get logs to saw by the thousand, or to purchase them; that, in this endeavor, she visited several log-owners who desired earlier in the spring to supply her mill with logs to saw by the thousand, with the view of obtaining stock, but that, in these and all other cases, she found that the logs with which the mills of Muskegon were to be supplied for the summer had been disposed of by contract; that the defendants were fully cognizant of this custom of making contracts, and were frequently notified that the plaintiff was willing and ready at all times to perform the contract on her part."

To which offer the counsel for the said defendants did then and there object as immaterial, irrelevant, and incompetent.

The Court. "The objection will be sustained, and the verdict will be 'no cause of action.'"

To which ruling the counsel of the said plaintiff, on behalf of said plaintiff, did then and there except; and the jury, under the direction aforesaid, then and their gave their verdict for the defendants of "no cause of action."

The judgment rendered upon this verdict is defended in this Court by counsel for defendants upon the sole ground that the damages claimed by the plaintiff are simply "*gains prevented*" or "*loss of profits*," and that under the authority of *Petrie v. Lane*, 67 Mich. 454 (35 N. W. Rep. 70), loss

Digitized by Google

of profits cannot be recovered as damages by a mill-owner for breach of contract caused by the failure of furnishing logs to be sawed at the mill. But, by reference to *Petrie v. Lane*, it will be observed that the case differs essentially from the one under consideration. The difference will be apparent from the language of Mr. Justice MORSE (at page 457) in delivering the opinion in that case, as follows:

"It will be noticed that the plaintiffs did not offer to show that they had incurred any damage by reason of expenses necessarily incurred in getting ready to perform this contract, or that the mill had been stopped or laid up for any time for want of work by reason of the breach of the contract on defendant's part. Nor did they even claim nominal damages. They put themselves deliberately upon the naked proposition that, as a matter of law, they were entitled to the profits upon all the logs mentioned in said contract, independent of any fact or thing showing actual damages. In other words, although they incurred no expense on account of preparing to perform this contract, and their mill was not closed because of the breach of the same, but was at work all the time manufacturing other lumber to its fullest capacity, they were, nevertheless, entitled to the profits they might have made in the fulfillment of this contract, and also all the profits they might make in the same time in sawing other lumber, thereby in effect doubling the capacity of the mill, and increasing its profits twofold."

Such was not the claim put forth in the case we are now considering. The plaintiff here seeks to recover only the actual damages incurred by the breach of the contract declared on. She was to receive certain compensation for doing specified work; that is, in manufacturing logs into lumber at an agreed price per thousand feet. Her damages are measured by the difference in the cost of manufacturing and the contract price. If the cost of manufacturing could be proved with a reasonable certainty, there could be no difficulty in ascertaining the damage.

In *Atkinson v. Morse*, 63 Mich. 276 (29 N. W. Rep. 711), the action was to recover damages for a breach of contract

Digitized by Google

in which the plaintiffs agreed to cut, haul, and deliver on the bank of a river all the merchantable cedar on a certain description of land at prices agreed upon, and they claimed to recover the difference between the cost of doing the job and the agreed price. The court charged the jury, in substance, that if the defendant violated the contract by refusing reasonable advances of supplies or money, and the plaintiffs were making a profit, or would have made a profit, on the polls, ties, and posts which they would have put in during the remainder of that season, then they were entitled to recover for loss of profits. We held that the rule of damages laid down by the court for the guidance of the jury in that case was correct; that the law is well settled that, under circumstances like those declared upon and proved in that case, the party prevented by the act of the other party from completing his contract may recover damages for the loss of profits he would have made had he not been prevented from performance. We also said, in that case (at page 281):

"Damages for loss of profits are more frequently allowed to be recovered in cases of tort than contract; but when loss of profits arising from a breach of contract can be proved with a reasonable degree of certainty, and such loss is directly traceable to the breach of the contract, there is no reason why such damages may not be recovered. The cases, however, are exceptional where they can be recovered, and such profits, in order to afford a basis for recovery, must not be conjectural or speculative, or subject to uncertain contingencies."

And in the case of *Petrie v. Lane*, relied upon by the defendants, Mr. Justice MORSE states the principle (at page 458) as follows:

"The compensation aimed at, and which the law intends to give, in an action for breach of a contract or agreement of this kind, is the damages actually incurred on account of such breach. The law seeks to make good the party injured by such breach, and to put him, as far as possible, in the same condition that he would have been in had the contract been performed. It is not intended that he shall profit by

Digitized by Google

the breach, and receive compensation for injuries that he has not suffered."

When a claim is made for damages arising from breach of contract, and evidence is offered to show loss of profits which might have been realized from a performance of the contract, the question to be determined is whether the damages claimed are too conjectural, speculative, or contingent to form a safe basis for estimating the damages. When the contract is executory, and the time of performance has expired, and the elements out of which the profits were to arise can be ascertained and proved with reasonable certainty, and especially where the compensation for performance is fixed by the agreement of the parties, there is no reason why the difference between the cost of performance and compensation agreed upon should not be recovered as actual damages suffered by the aggrieved party, whether they be called gains prevented or loss of profits. Such damages are the direct consequences of the breach of the contract, and courts have always allowed them. *Atkinson v. Morse, supra; Goodrich v. Hubbard*, 51 Mich. 62 (16 N. W. Rep. 232); *Loud v. Campbell*, 26 Id. 239; *Burrell v. Salt Co.*, 14 Id. 34; *White v. Moseley*, 8 Pick. 356; *Holden v. Lake Co.*, 53 N. H. 552; *Masterton v. Mayor of Brooklyn*, 7 Hill, 61; *P., W. & B. R. R. Co. v. Howard*, 13 How. 307; *Waters v. Towers*, 20 Eng. Law & Eq. 410. See 1 Suth. Dam. 117, 118, and note 1, where the authorities are collected.

The declaration alleged a good cause of action, and the proof offered would have entitled the plaintiff to recover. It is a mistake to suppose that saw-mill owners are without the protection of the law, or that their business is so hazardous and uncertain that parties dealing with them can violate their contracts with impunity. Like others, they can recover actual damages arising from a breach of contract.

The court should have heard the case, and if, after the testimony was introduced, it was too conjectural, uncertain, or

Digitized by Google

contingent to form a proper basis for recovery, he could then have taken the case from the jury.

It is not good practice to decide a case upon the opening of counsel, and the cases are exceptional where it can be safely done.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

DAVID FREY v. ALEXANDER MICHIE AND HENRY F. HORNER, COUNTY SUPERINTENDENTS OF THE POOR OF WAYNE COUNTY.

68 323
69 44
69 48
68 323
84 247
85 647
68 323
93 336
68 323
96 307
68 323
98 105
68 323
99 370
68 323
111 508

Title to office—Mandamus—Bill in equity—Quo warranto.

1. The repeated decisions of this Court show the impropriety of allowing a private relator by *mandamus* to litigate the title of his adversary to a public office, which impropriety is more marked where, in assailing that title, the appointing or electing power of two municipal corporations with rival claims would have to be discussed and decided collaterally.

   So *held*, where an appointee of the board of supervisors of Wayne county to the office of county superintendent of the poor applied for *mandamus* to compel two of the superintendents to admit him as a member of the board in place of a *later* appointee of the county board of auditors of the same county, both boards claiming such appointing power; and the writ was denied both as an improper remedy, and as one which would not, if competent, settle any rights, and as seeking by private proceedings to unsettle a long course of public business.

2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—A legislative interpretation of old laws has no *judicial* force.

   b—A practical construction of a statute under which the right of appointment to office has been exercised for more than a third of a century by a municipal corporation, and not disturbed by any one, whether conclusive or not, deserves too much respect to

Digitized by Google

throw any doubt on the right of *later* appointees to be treated as valid officers *de facto* at least.

c—The only way to try titles to office finally and conclusively is by *quo warranto*.

d—Even when *mandamus* is issued to seat a person who produces the proper evidences of title, it does not settle the *title* at all.

e—A bill in equity will not lie to determine between two municipal bodies asserting the same power of appointment, but the boundaries of their franchises must be determined by *quo warranto*.

f—A bill in equity only lies in aid of *quo warranto*, where expressly authorized by statute, and never to determine the usurpation of office or franchises.

g—Under our system, while a private person may have a valuable interest in an office, we have always treated it as a public trust in which the public interest is paramount.

h—Although a relator may be brought into the record in *quo warranto* cases as a claimant of office, yet he is not a necessary party, and has no control over the litigation. The proceeding, although of a mixed character, is technically an information for misdemeanor, and ouster of the usurper is not its only purpose. It may continue after his tenure expires, and the court may, if it chooses, punish him by fine. *People v. Hartwell*, 12 Mich. 508; *People v. Miller*, 16 Id. 205.

i—The respondent in a *quo warranto* case has an absolute right to trial by jury. *People v. Doesbur*, 16 Mich. 133.

j—The default of a defendant in a *quo warranto* case leads to his ouster, but not to judgment for relator. *People v. Connor*, 13 Mich. 238; *People v. Molitor*, 23 Id. 341.

k—The relator in a *quo warranto* case cannot withdraw and influence the prosecution in favor of defendant or any one else. *People v. Knight*, 13 Mich. 230.

l—*Quo warranto* cases begun at the circuit cannot be brought to this Court without the intervention of the Attorney General as representative of the State. *Babcock v. Hanselman*, 56 Mich. 27.

Application for *mandamus* to seat an appointee of the board of supervisors of Wayne county as a county superintendent of the poor. Submitted January 17, 1888. Denied January 26, 1888. The facts are stated in the opinion.

Henry M. Duffield, for relator.

Digitized by Google

Edwin F. Conely, for respondents.

CAMPBELL, J. This Court, upon the application of relator, gave him an order on respondents to show cause why they do not admit him to sit with them as their colleague on the board of county superintendents of the poor of Wayne county. Notice was ordered to be served on the parties interested, and notice was actually served on the board of county auditors of Wayne county, and upon Patrick Blake, the appointee of the board of auditors to the place claimed by relator. All of these parties answered and showed cause. The question now arises whether a *mandamus* should issue as prayed. This requires a statement of the real controversy.

The petition does not fully set out the real state of the case. It avers no more, in substance, than the appointment of relator by the board of supervisors of Wayne county at the October meeting in 1887, to a three years' term, beginning January 1, 1888; the filing of a bill by the Attorney General to prevent such an appointment by the board of auditors, and an injunction granted, which was dissolved December 31, 1887; the appointment of Patrick Blake by the auditors thereafter; and the refusal of respondents to admit relator on January 3, 1888, when he produced his appointment and demanded his seat, on the ground of the nullity of his appointment. It does not show what person he was to succeed as outgoing commissioner, and it does not attempt to explain the real controversy. But as the answers have put us in full possession of the omitted facts, we shall proceed to consider them.

The real controversy is one between the board of county auditors of Wayne county, and the board of supervisors of the same county, concerning their respective claims to exercise the appointing power. Neither of these bodies is made respondent, and it is not seriously claimed that either of

Digitized by Google

them could be, to a petition for *mandamus*. The application is, therefore, as now explained, one to settle the powers of two important county boards, in a controversy between private persons. This is of itself a very serious consideration in passing upon the jurisdictional dispute. But a fuller reference to the condition of things will enable us to determine very readily how far this proceeding should be sustained.

It appears from the returns that, when the petition was filed, the office was already full, Mr. Blake having been admitted to his seat. This fact ought not to have been omitted from the petition. It appears, further, that he was chosen as his own successor, and there was no interval between his holding and re-appointment. It appears, further, that Blake was appointed by the board of auditors, and that both of the respondents were appointed in the same way, so that if he is not in office they are not.

Under this petition it cannot be disputed that all of these persons are officers *de facto*. But this does not rest on estoppel. It appears that before and ever since the adoption of the Constitution of 1850—a period of over 40 years—the county auditors have always made these appointments. If there is anything to make it illegal, it has only been traced to the Constitution of 1850. Reference was made, but with no apparent confidence, to an amendatory act passed in 1885, whereby the old section (1756) of Howell's Compilation, which provided for the appointment of county superintendents, was changed by an addition making the city poor commissioners of Detroit *ex officio* members of the county board, so that it should "consist of the three superintendents appointed by the supervisors, and of the members of the board of poor commissioners of the city of Detroit." Laws of 1885, p. 76. The only change made was by this amendment, which did not purport to make any change in the board as existing, except by adding to its numbers the outside members. This mention of appointees of the supervisors, at most,

Digitized by Google

could only be a legislative opinion on the practice under the existing law, which it did not attempt to change as to the mode of appointment. It is unnecessary to say more than that a legislative interpretation of old laws has no judicial force. Whether right or wrong, must be determined by the statutes themselves. Previous to 1880 the county auditors were vested with the same powers conferred on boards of supervisors under State laws, with some specified exceptions. How. Stat. § 513. This statutory grant has never been expressly repealed, and, whatever else was out of their power, they certainly appointed the county superintendents of the poor. If there is any change in this regard, it is worked by implication from the Constitution or subsequent legislation.

Whether this has been done we do not now propose to decide, for several reasons which will be referred to. A practical construction for more than a third of a century, not disturbed until now by any one, whether conclusive or not, deserves too much respect to throw any doubt on the right of respondents and Mr. Blake to be treated as valid officers *de facto* at least. And this is conclusive against the present application, and has been so held directly and impliedly by a course of decisions of this Court.

The only way to try titles to office finally and conclusively is by *quo warranto*. Even where a *mandamus* is issued to seat a person who produces the proper evidences of title, it does not settle the title at all. *Doran v. De Long*, 48 Mich. 552; *People v. Detroit*, 18 Id. 338. It was held in *Jhons v. People*, 25 Mich. 499, that the title to office cannot be tried collaterally. See, also, *Curran v. Norris*, 58 Mich. 512 (25 N. W. Rep. 500). And although a bill in equity has a broader operation than a writ of *mandamus*, and is further reaching, it was held in *Detroit v. Board of Public Works*, 23 Mich. 546, that it would not lie to determine between two municipal bodies asserting the same power of appointment, and that the boundaries of their franchises must be determined

Digitized by Google

by *quo warranto*. The bill filed against the board of auditors, referred to in the return as well as in the petition, came within this decision, and the injunction dissolved by the circuit court should never have been granted. It only lies in aid of *quo warranto*, where expressly authorized by statute, and it does not lie at all to determine the usurpation of office or franchises.

But there is no rule of law which will allow the title to office to be tried in a private controversy controlled by individuals. Under our system, while a private person may have a valuable interest in an office, we have always treated it as a public trust in which the public interest is paramount. Although a relator may be brought into the record in *quo warranto* cases as a claimant of office, yet he is not a necessary party, and has no control over the litigation. The proceeding, although of a mixed character, is technically an information for misdemeanor, and ouster of the usurper is not its only purpose. It may continue after his tenure expires, and the court may, if it chooses, punish him by fine. *People v. Hartwell*, 12 Mich. 508; *People v. Miller*, 16 Id. 205.

It was held in *People v. Doesburg*, 16 Mich. 133, that respondent had an absolute right to trial by jury. While in *mandamus* cases issues may also be tried by jury, yet it is not in many respects like a common-law jury trial on an issue upon the information and regular pleadings. But, as already suggested, the issue is between the people and the respondent charged with usurpation. The defendant's default leads to his ouster, but not to judgment for relator. *People v. Connor*, 13 Mich. 238; *People v. Molitor*, 23 Id. 341. The relator cannot withdraw and influence the prosecution in favor of defendant, or any one else. *People v. Knight*, 13 Mich. 230. No one can be recognized but the Attorney General for notices or stipulations. *People v. Pratt*, 14 Mich. 333, and 15 Id. 184; *People v. Molitor*, 23 Id. 341.

Digitized by Google

All of those cases show the impropriety of allowing a private relator by *mandamus* to litigate the title of his adversary. And this is the more improper, where, in assailing that title, the appointing or electing power of two municipal corporations with rival claims would have to be discussed and decided collaterally. Even in *quo warranto* cases begun at the circuit, they cannot be brought to this Court without the intervention of the Attorney General as representative of the State. *Babcock v. Hanselman*, 56 Mich. 27 (22 N. W. Rep. 99). And, under the discretion vested in this Court in cases of *quo warranto*, it would be our duty to prevent litigation which would not further the complete settlement of the controversy.

The only way in which the disputes concerning the distribution of powers between the auditors and supervisors can be completely set at rest is by proceedings to test the right of the board charged with usurpation of franchises. How far this ought to be done after so long an acquiescence, without legislative action, it is not for us on this record to suggest. All of the disputed powers or actions may not perhaps involve special franchises, but the power of appointment to office is a franchise beyond any question. We should be very averse to sanctioning any partial or inconclusive proceedings.

The *mandamus* is denied both as an improper remedy, and as one which would not, if competent, settle any rights, and as seeking by private proceedings to unsettle a long course of public business. Respondents will recover costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

Digitized by Google

68 330
104 628
68 330
127 495

HIRAM N. LEE v. THE BOARD OF SUPERVISORS OF IONIA COUNTY.

Sheriff's fees—"Committed" and "discharged" defined—Board of supervisors.

1. The terms "committed" and "discharged" are words of recognized legal meaning, and refer only to the *beginning* and *end* of the term of imprisonment.
2. Charges by a sheriff for taking a prisoner to court and returning him to jail do not fall within the statute allowing a fee of 35 cents for every person committed to and discharged from jail.
3. The board of supervisors have a considerable discretion in giving pay for services on which the law is silent, which must be exercised by them, and not by this Court, if a proper case in their judgment arises; but the specified fees, over which they have no discretion, should not be made to include anything not fairly within their terms.

Application for *mandamus* to compel respondents to allow relator certain fees as sheriff. Submitted January 18, 1888. Denied January 26, 1888. The facts are stated in the opinion.

Davis & Nichols, for relator.

A. A. Ellis, prosecuting attorney, for respondents.

CAMPBELL, J. Relator was allowed to take an order on respondents to show cause why they should not allow him certain fees for alleged services for which they refused to give him what he claimed. Upon the return it appears that every item charged and not allowed was a charge for commitment or discharge from jail, and was made under the statute fixing sheriff's fees in criminal cases, which allows "for every person committed to jail, 35 cents; for every person discharged from jail, 35 cents; for taking a prisoner before a

Digitized by Google

court for examination or to jail, 15 cents." The supervisors allowed these rates of 35 cents for every commitment in the beginning of imprisonment, and for every final discharge, and 15 cents for taking prisoners back and forth. But the relator claims that he should have an additional 35 cents for every time a prisoner is taken to court, and the same sum when brought back, and claims that each such removal is a discharge, and each such return a commitment.

The reason for his urging these claims before the supervisors is represented to them as arising out of the necessity of employing a turnkey at considerable expense, for which the law gives no other payment.

The statute seems to us too plain for discussion. The terms "committed" and "discharged" are words of recognized legal meaning, and refer only to the beginning and end of the term of imprisonment. Between those periods the prisoner, unless he escapes, is in continuous custody; and whether in jail, or out of jail in charge of an officer, his going through the prison door in either direction is no more an interruption of his imprisonment than going into the prison yard, and retiring from the common room to his cell.

The language speaks for itself, and cannot have any double meaning, or be warped by any supposed meagerness of the sheriff's compensation. The supervisors have a considerable discretion in giving pay for services on which the law is silent. The statute gives them this discretion; and they, and not this Court, must exercise it if a proper case in their judgment arises. How. Stat. § 9055. But, when they do it, they should act upon it as it is, and not be asked to cover it up under some other name. The specified fees, over which they have no discretion, should not be made to include anything not fairly within their terms.

The present bill on its face contains charges as to some prisoners which do not indicate that the committal and discharge were not those mentioned in the statutes. Other items

Digitized by Google

show a number of committals and discharges of the same prisoner. But the sheriff's explanation removes any possible complaint of misrepresentation, because he shows just what services he meant to charge for. We granted him an order to enable this question to be passed upon and decided finally. But instances are not unknown where there is a lack of such frankness, and where the statutory fees are charged and allowed to cover claims which are entirely beyond the law.

The supervisors were right in holding that the amounts which they rejected were not statutory fees. But as relator has acted fairly in presenting and explaining his claim, we do not think he should be compelled to pay costs. It is well enough that the question has been raised for decision.

The *mandamus* is denied, without costs.

The other Justices concurred.

---

68 332
113 413

JOHN MCDANIEL v. RILEY MCCOY ET AL.

Equity—Bill to set aside deed for fraud—Mental incompetency.

1. It has never been held that a complainant not under guardianship may not file a bill, by solicitor and counsel, for relief, and courts of equity, instead of dismissing such bills, usually take some pains to see that the rights of a weak-minded party shall not be sacrificed.
2. Cases like the present depend so much upon their own facts that it is of little use to attempt to measure them by exact precedents, and the equitable rules which protect old and feeble-minded or insane persons from being spoiled of their property are familiar, and not technical.
3. Without attempting to measure the exact boundaries in the record between actual and constructive fraud, we think none of the transactions relied upon by the defendants, whether con-

Digitized by Google

nected with the deed or the alleged settlement, were the legal acts of the complainant; which deed is set aside and declared null and void.

Appeal from Cass. (Smith, J.) Argued January 19 and 20, 1888. Decided January 26, 1888.

Bill to set aside a deed. Decree dismissing the bill reversed, and decree entered granting the relief prayed for. The facts are stated in the opinion.

E. L. Hamilton and *O. W. Coolidge*, for complainant.

Spafford Tryon (*Harsen D. Smith*, of counsel), for defendants.

CAMPBELL, J. Complainant filed his bill to set aside a conveyance alleged by defendants to have been made in August, 1882, to his daughter, and their mother, Sarah McCoy, wife of John McCoy. Complainant rests his claim for relief on actual and constructive fraud. Defendants, whose mother died a little more than a year after the date of the conveyance, set up in defense, not only the legal validity of the deed, but the further fact that, in November, 1884, a bill similar to the present one was filed, and was finally settled by the execution of a life-lease to the complainant, and a release by him of further claims to support from defendants and their father. The court below dismissed the bill, but without prejudice to proceedings by his heirs hereafter. This would seem to indicate that complainant was supposed to labor under some disability to sue, as otherwise what would bind him would bind his heirs. But it has never been held that a complainant not under guardianship may not file a bill, by solicitor and counsel, for relief. Many such cases appear in our own records, and courts of equity, instead of dismissing such bills, usually take some pains to see that the rights of a weak-minded party shall not be sacrificed. Cases like the present depend so much upon their

Digitized by Google

own facts that it is of little use to attempt to measure them by exact precedents. The equitable rules which protect old and feeble-minded or insane persons from being spoiled of their property are familiar, and not technical. The facts in the present case are contradictory, and we must determine as well as we can where the true equities lie.

Complainant, now an old man of about 84 or 85 years of age, had lived on a valuable 80-acre farm, in Cass county, for a great many years, and his family had grown up, and part of his children were dead, with or without issue, and part had left the neighborhood or the State. In 1881 his wife was dead, and he was living on his farm, and he had some years before been in bad health, and had never entirely regained his strength. The daughter, Mrs. McCoy, to whom the deed was made, lived near. In 1881 he was removed—as he says unwillingly, and as defendants claim willingly—to Mr. McCoy's, and his farm was worked by others. He carried a pretty large sum of money with him to McCoy's, which seems to have gone in some way which he cannot account for. Until 1884 he never went away from McCoy's to stay or visit, and it is not clear that he ever left the house at all. McCoy received the proceeds of his farm and of some of his stock, and claims to have paid the money over to the old man, who denies any such payment. During his daughter's life complainant appears to have been reasonably content with her treatment, and makes no charge that she was not kind, as we have no doubt she was. After her death he claims to have been badly treated and neglected in a scandalous way. But this subsequent treatment, whatever it was, has no immediate bearing on the deed itself, although relevant to some other aspects of the case.

Sometime in 1881 a will was drawn by Mr. Schermerhorn, a justice of the peace, who did not know him personally. This is said by the witnesses to have left his realty to Sarah. Complainant is unable to read or write, and the contents of

Digitized by Google

these papers, if he knew them, were communicated to him by others. In August, 1882, Mr. McCoy procured Schermerhorn to come to his house and make the deed in question. This he claims to have done at complainant's request, because, as he represented, he was afraid the will would not stand. Schermerhorn says he had a conversation with complainant to the same purport, and expressing a desire to provide for Mrs. McCoy as the only child that had served him properly. According to Mr. Schermerhorn the consideration was fixed at $3,000 as not far from the value of the farm, and complainant made the deed, as he said, because his daughter had cared for her mother before her death, and he expected to make his home with her for the rest of his life.

Complainant claims that he was induced to sign, or rather to affix his mark to, the paper without understanding it was a deed, but for another purpose, and that he never knew it was a deed till afterwards. It was recorded the same day, McCoy making a special errand to get this done, at Cassopolis, late in the day, and, as he says, at complainant's request. Complainant denies this altogether. One of defendants, who was a witness, as she says, of the transaction, gives the old man's reason for hurrying up the record as a fear that something might be recorded ahead of it. Such a reason is ridiculous, and, if really given, would be strong evidence of lack of competency in the grantor. But no one else gives it, and it is not plausible. The only danger that would make speedy record desirable was that the old man might convey to somebody else; and no sane man would suggest such a danger against himself.

At his daughter's death the next year, complainant did not see her, and some of defendants' witnesses say he would not do so, but that after the body was removed he wanted to see her. After this he moved, or was removed, into a bed-room near the sitting room, where he continued, according to the testimony for the defense, to spend his time constantly, and

Digitized by Google

with very few, if any, intermissions, lying on a bed which was filthy in the extreme, not allowing himself to be cleaned or decently dressed, until the bed and himself became intolerably noisome. The testimony for complainant indicates that he was subjected to this vile experience by the neglect of McCoy and his family. They claim that it was his own ugliness and obstinacy which led him to continue in this brutish and unclean way, and that day and night, both when alone and when any one was near, he would curse and swear and pound on the wall at all hours of the night, and resist all attempts to dress or cleanse him. In November, 1884, he was removed by a man sent by the judge of probate, and carried to another place. The person who removed him says he showed intense joy at his deliverance, manifesting it by shouts and ejaculations. Soon thereafter, by the action of a son who had come from a distant state and intervened in his interest, actually or apparently, the suit before referred to was begun to rescind the deed.

In the conflict of testimony concerning this deed it would not be profitable to set forth the testimony at large. Much of it is of small account, and many things are unexplained. But we have become convinced of some decisive facts, and will refer to them briefly.

We think it clearly shown that three or four years before his removal to McCoy's he had become affected by some bodily maladies which also impaired his mental powers, and, while not producing what is popularly known as "craziness," had brought about a condition which the medical witnesses agree in regarding as the *dementia*, or mental disorder, frequently attacking the faculties of old persons, and known as *senile dementia*. We are not entirely satisfied that this had gone far enough to destroy his capacity to attend to his ordinary farm concerns, but there are facts in the case indicating that he could not do even this very safely; and if there was an honest intent in McCoy, as there probably was in Mrs.

Digitized by Google

McCoy, in his removal to their house, it is evident that it was because it was thought he needed looking after as practically incompetent. It is easy to see that during Sarah McCoy's life he did not live or act at all as men do who own property, or mean to look after it. Although the testimony is meager during this period, it indicates not very much more than an animal existence, so far as any activity is concerned, and when witnesses speak of the sufficiency of the care bestowed on him it goes very little further. If the testimony is believed of his conduct at Sarah's death, it is entirely inconsistent with the affection which it is claimed he bore to her, and equally inconsistent with the idea that he was regarded as having the usual attributes of decent humanity. The defendants' testimony concerning his conduct and ways during the subsequent period of his life in that house not only indicates a loss of all the self-control and restraint which characterizes every decent person, but shows just as plainly that he was considered by the household as not much, if any, better than a beast. This state of things is more significant than anybody's subsequently formulated opinions. It shows that the unfortunate state into which he had fallen was not altogether new, nor much more aggravated than might fairly be traced to his former deficiencies, as worked upon by want of sympathy and attention. The testimony shows that he was now and then rational in his talk, and on such occasions exhibited no more mental weakness than garrulousness, and lack of memory, and some incoherence. His removal from McCoy's seems to have been followed by a decided improvement, which is visible in his testimony, but which does not show him fit to dispose of his property.

The real occasion for the making of the deed in August, 1882, is not shown, and can only be conjectured. Sarah McCoy is dead, and all the other witnesses, except Schermerhorn, who pretend to any full knowledge, are interested, actually or by feeling, in sustaining it. It is incredible that

Digitized by Google

the grantor, if sane, should have meditated and determined on this step without some further explanation of his purpose and reasons. To be told that he sent for a justice and wanted to convey to his daughter is not an explanation of the facts. Schermerhorn was not only a stranger, but he had no knowledge, according to what we infer from his testimony, which would put him on his guard as to the necessity of vigilance. It is quite as likely that he has not remembered, because he had no such suspicions, from whom all the explanations came, and may have confounded what was said by others with what was said by complainant. It is not necessary to assume any intentional misconduct on his part. But if complainant was the person from whom he received instructions, he certainly did not carry them out. It was his business to embody the entire arrangement in the papers, and complainant's inability to read made this the more necessary. According to his own statement the consideration of the deed was not only past, but future, support and care from Sarah, and not from any one else. If it had been proposed to him to depend on his son-in-law or Sarah's children for future care, there is no hint anywhere that he would have conveyed on such a basis. But no consideration but a money one, of much less than the real value of the land, was inserted, and there were no papers drawn and no terms agreed upon for the future care of complainant, by Sarah or any one else. There is no proof whatever that there was even a verbal promise from any one. The house was not Sarah's, but her husband's, and she could not control the household. These things indicate plainly that there was no complete agreement, and that the deed did not embody the old man's purposes at all. A deed made under such circumstances by an ignorant man, in old age and feeble, even if of sane mind, could not be sustained without doing injustice. The fact that he executed it is not consistent with the exercise of mental capacity, free from influence or misunder-

Digitized by Google

standing, and if he was given to believe that this deed carried out his views he was deceived. But, taking all the testimony together, we do not think the deed was the understood act of complainant at all, or that he was fit to make it.

It is testified by physicians, and is consistent with experience, that any serious diminution of mental powers due to old age is not likely to be recovered from to any considerable degree. The record shows, we think, that while there has been a great improvement, now and then, in the behavior of complainant, he is weak and easily handled by those who seek to influence him, and is fickle and unsettled in his purposes. If the deed of August, 1882, was really understood by him to be a deed, it is plain enough that he did not use any sense in making it, and did not understand its effect on his own affairs. But his denial of such understanding is not only corroborated by his own conduct, but is somewhat confirmed by John McCoy's testimony that he received and accounted to complainant for the proceeds of the crops on his farm a year and more after the deed. There is no pretense that, if this deed was the act of complainant, he retained any interest in the farm.

If complainant was incompetent to make the deed understandingly, the subsequent transactions purporting to be a settlement are no better. But when we look at the facts, it is manifest that complainant had no real part in it. Although a suit was begun to rescind the deed, it was managed by complainant's son throughout, and Mr. Howell, the counsel who began it, never saw complainant at all. This does not look very much like treating him as competent. The settlement by Mr. Howell, whereby a life-lease was given to complainant, and he released John McCoy and his family from supporting him, was closed without consulting complainant at all in its preparation, and put him in a position of no special advantage to himself. The testimony of the sewing-machine agent

Digitized by Google

who dealt with him is not satisfactory. We have no idea that he took any intelligent part in it. We do not care to dwell on the alleged facts and contradictions in the narrations. No man supposed to be of sound mind would have been made such a mere puppet in dealing with his interests.

Without attempting to measure the exact boundaries in the record between actual fraud and constructive fraud, we think none of the transactions relied on by defendants, whether connected with the deed or the alleged settlement, were the legal acts of complainant. We think the deed should be set aside, and declared null and void. The record gives us no sufficient means of determining how far his other property has been misappropriated, and the bill does not ask relief concerning it. The decree must be reversed, with costs, and a decree made in accordance with what has been now announced.

It is to be hoped that he will be better looked after in future.

The other Justices concurred.

Digitized by Google

CHARLES A. BARHYTE v. JACOB SUMMERS.

Practice in circuit courts—Limiting number of witnesses.

It is error for the trial court to limit the number of witnesses to be sworn by either party, upon a material and one of the main issues in the suit.[1]

Error to Eaton. (Hooker, J.) Argued January 20, 1888 Decided January 26, 1888.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

H. F. Pennington, for appellant.

Frank A. Dean and *Garry C. Fox*, for plaintiff.

MORSE, J. This was an action brought originally in justice's court by the plaintiff, alleging that the defendant sold to him a horse which he knew to be unsound, fraudulently representing said horse to be sound "as far as he knew."

The two vital questions upon the trial in the circuit, to which court it was appealed, were:

1. Was the horse unsound, lame, at the time of the sale?
2. If so, did the defendant know of such lameness?

The court in the course of the trial, and while the plaintiff had the case, said to plaintiff's counsel:

"You have called five witnesses as to the condition of this mare before the sale. How many more do you propose to call?"

The counsel answered that it was a vital point in the issue, and he did not know as there was any limit.

[1] See *Riggs v. Sterling*, 60 Mich. 644 (head-note 10), where it was held that, in an action of ejectment, where the only question was as to the value of a homestead, it was not an abuse of discretion to limit the number of witnesses to six on each side.

Digitized by Google

The Court. "I don't think it ought to be a question of mere numbers; five witnesses are as good as five hundred. I think I will draw the line there."

But he finally allowed plaintiff to examine seven witnesses upon this point, saying that he should permit no more to be sworn; and stating:

"You have already called seven witnesses showing that the horse limped. It must be pretty well established if it ever can be."

The counsel for plaintiff then offered to swear other witnesses to the fact that they had seen the horse limp before the sale to plaintiff, and this offer being denied, plaintiff's counsel took exception.

When the defense was proving the issue upon its part, and had examined seven witnesses to disprove the lameness of the horse, and offered the eighth for the same purpose, the court said:

"I think you have exhausted your number. You had seven before you called Mr. Kirk [the witness offered]."

The counsel for the defendant then said that he desired to offer the testimony of 12 additional witnesses to the effect that they had known the mare for weeks and months prior to the sale to plaintiff; had seen her frequently; that they had seen her at the barn, seen her exercised, and that she was sound and all right up to the date of the sale.

The court excluded the offered testimony, and defendant's counsel excepted. He was permitted afterwards to show by three witnesses, other than the seven, and by the defendant, that they were present at some of the times when the lameness was observed by plaintiff's witnesses, and noticed nothing of the kind.

The jury found in favor of the plaintiff.

The counsel for defendant claims that the remarks of the trial judge made to plaintiff's counsel about the value of the testimony of five witnesses, and that the lameness of the

Digitized by Google

animal must be pretty well established by the seven witnesses if it ever could be, were improper, and tended to the prejudice of the defendant. The remarks were certainly not proper, but whether they tended more to the injury of one party than another we are not able to determine; nor is it necessary to do so, as the case must be reversed, and a new trial granted, for another reason.

The court committed substantial error in limiting the number of witnesses to be sworn by either side upon a material and one of the main issues in the suit. The counsel for the plaintiff frankly admit that, if the suit had gone against their client, they should have asked a reversal here upon the same ground that defendant now urges; but they argue that under the ruling no harm was done to the defendant, but that he in fact reaped an advantage by being permitted in the end to swear more witnesses upon the point of the lameness of the horse than the plaintiff.

But the defendant was entitled to offer and produce all the proof he had upon this matter, and it is impossible to say that the denial of such right did not prejudice his case.

We do not consider it necessary to notice the other assignments of error, as upon another trial the question is not likely to arise.

The judgment of the court below is reversed, with costs, and a new trial granted.

The other Justices concurred.

Digitized by Google

HENRY G. BIGELOW v. CHARLES REYNOLDS AND ANDREW J. EMLAW.

Trespass—Ouster of sublessee—Right of action—Measure of damages—Partnership—Suit by one copartner—Estoppel.

1. An action of trespass for the ouster of *sublessees* from the possession of a mill standing on leased ground by the owners of the freehold, if sustainable at all, belongs to the sublessees.
2. Under a declaration claiming damages for the interruption of a lumbering business by a wrongful possession of a saw-mill, if anything is recoverable, it is damages for breaking up or interrupting an *active* business, and *rental value*, if allowable at all can only be considered in determining the amount of damages as a *possible* element, but not as *actual* damages.
3. One partner cannot bring a separate action at law for his supposed share of a partnership grievance.
4. While parties may sometimes be bound by what binds their *assignors* in privity, there is no rule which binds any one by *estoppel* by the acts and doings of his subsequent grantees.

Error to Ottawa. (Arnold, J.) Argued January 20, 1888. Decided January 26, 1888.

Case, with allegations of trespass *vi et armis*. Defendants, bring error. Reversed. The facts are stated in the opinion.

Akeley & McBride, for appellants.

Delano & Bunker, for plaintiff.

CAMPBELL, J. This is an action of trespass on the case, but containing allegations of trespass *vi et armis*, brought by plaintiff against defendants ostensibly for his disturbance in the possession of certain mill property, which is alleged to be personalty. The first count alleges his ownership and management of the property, when disturbed, in entirety, and avers a trespass on April 15, 1879, and divers times since.

Digitized by Google

The second count, which is the one on which recovery seems to have been had, claims an interest of an undivided one-third, but as a partner with two other persons. The period of disturbance is set between April 15, 1879, and November 25, 1879.

On the trial, plaintiff's case was put upon this general state of facts: That in 1872 a lease was made by defendants and one Carlton L. Storrs, whereby the latter was made lessee for 10 years of the mill premises, and this lease became vested afterwards in plaintiff and two partners, named Enos Stone and Wales Storrs, who did business in the mill till about 1876, when they gave it up, and went into other pursuits, and never resumed it. In 1877 the mill seems to have been leased to a tenant, and in 1878 it was further leased to Glover and McFee. In 1878, defendants, who owned the freehold, purchased of the First National Bank of Grand Haven an execution title to the mill property, which they supposed valid, and which, if valid, made them owners of the whole title, and entitled to possession, subject to no other claim, unless, possibly, one created by a mortgage of plaintiff's interest to Edward Bigelow. Glover and McFee recognized defendants as entitled to possession, and put them in possession; and there was testimony that plaintiff said to defendants, substantially, that he approved their purchase.

Defendants ran the mill through the season of 1879, with no objection. At the close of the season, plaintiff asked them for an accounting. Subsequent transactions introduced some new elements, and the recovery below was only sought and had for the rental value for that year. The suit was begun in September, 1885, but recovery was had back to April, 1879,—more than six years before suit brought,—upon the apparent notion that nothing became due till the close of the season. If the possession was wrongful, an action would lie at once, and need not be postponed till that time.

Digitized by Google

There were several questions raised by the assignments of error which we do not think it necessary to consider separately, as enough can be grouped to dispose of the case.

The only trespass committed, if any, was committed when McFee and Glover were tenants, and during their term. The action of trespass for that entry would have been theirs, if it lay at all. But they admitted defendants peaceably and voluntarily, and no actual trespass was committed. In April, 1879, defendants were in peaceable occupancy, claiming title to the land and mill property, and, whatever else they may have done, they committed no trespass. There was no proof that plaintiff or any one else objected to their continuance in possession during the time covered by the declaration.

But, beyond all this, the only count which is relied upon, and the one on which the case was tried, which in this respect resembles the first count, is one for the damage done to plaintiff by the interruption of an existing lumbering business which was meant to be carried on. But on the trial the recovery was had on the basis of a mere occupancy of premises, for which defendants were adjudged to pay a rental value. This was objected to as not admissible, and rightly so.

Under the declaration, if anything was recoverable, it was damages for breaking up or interrupting an active business; and rental value, if allowable at all, could only be considered in determining the amount of damages as a possible element, but not as the actual measure. There were two objections to this. One was that they were let in by actual tenants, the terms of whose lease do not appear, but which might, under some circumstances, and by acquiescence of the owners of the leasehold, have furnished the rental measure for another year, unless changed. Another is that plaintiff showed distinctly that neither he nor his partners had any business to break up, and could not have lost any sum on that score, as rent or otherwise; so that the cause of action, if any existed, was completely variant from the one declared on.

Digitized by Google

But, furthermore, there is a fatal objection to the cause of action as declared on in the second count. Plaintiff declared as a member of a partnership whose business was interfered with, and claimed an undivided third of the damages for that injury. There is no rule of law which will allow a partner to bring a separate action at law for his supposed share of a partnership grievance. Partners do not own undivided shares in such a sense that each can sue separately for his part in a common wrong. Such actions are not severable, and all must join in bringing them.

The peculiar character of the record renders it a little difficult to understand what was proved and what was not proved. The property is charged in the declaration as pure personalty, but the only evidence of title by lease describes the mill-lot, and says nothing of mill or fixtures, and we find no distinct proof on the subject that is conclusive. This is especially important, because defendants are landlords. So it is assumed by the court that the assignment from the bank to defendants was of a void execution title, but the record does not show how it was void, if at all, and exception is taken to the statement in the charge concerning the concession. One of the means proposed by plaintiff to show the character of the property as personalty was subsequent litigation in a federal court with the assignees of these parties. But, while parties may sometimes be bound by what binds their assignors in privity, there is no rule which binds any one by estoppel by the acts or doings of his subsequent grantees. While the court below seems to have had the proper view of this question, it was, nevertheless, error to admit the testimony concerning these legal proceedings, and we think it quite likely that this led to mistakes in the judgment. There are a good many things in the bill of exceptions indicating that the trial became confused. But, however this may be, it is quite clear that the plaintiff did not make any proof of the case made in his declaration, and that

Digitized by Google

the second count made out no cause of action at all, and that a majority of the claim of damages arose more than six years before suit. We cannot tell, in this confusion, just how far there is anything recoverable on any basis, and in reversing the judgment we shall remand the case for a new trial, and leave the parties to determine for themselves their future course.

The judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred. CHAMPLIN, J., did not sit.

---

68 348
73 403
73 404
68 348
79 379
68 348
86 367
68 348
95 309
68 348
99 145
68 348
151 s 76
f151 s 77
151 80
68 348
157 s401

IN THE MATTER OF APPLICATION TO APPOINT A SPECIAL GUARDIAN FOR GEORGE R. BASSETT, AN ALLEGED INCOMPETENT PERSON.

Mentally incompetent person—Appointment of guardian—Petition—Order of probate court—Special guardian.

1. A petition under How. Stat. § 6314, for the appointment of a guardian for an alleged incompetent person, must contain a statement of facts authorizing the appointment, and must show upon its face that it is made by some one of the persons named in the statute, and also inform the court *who* will be affected by such appointment, which will manifestly include the presumptive heirs at law and distributees.

2. A petition which states that it is necessary that a guardian of the person and estate of the alleged incompetent person be appointed, because he is mentally incompetent to have the care and management of his property, raises an issue to be determined by the probate judge, and is not open to the objections discussed *In re Brown*, 45 Mich. 326, and *In re Storick*, 64 Id. 685.

3. An order by a judge of probate appointing a guardian for an incompetent person must cover both the *person* and *estate* of the ward.

Digitized by Google

4. A decree by the probate court adjudging an alleged incompetent person to be mentally incompetent to take care of himself and manage his property is essential, and such adjudication should appear of record. *North v. Joslin*, 59 Mich. 625 (head-note 6).
5. The proceeding to appoint a *special* guardian for an incompetent person is purely ancilliary to the appointment of a *general* guardian, and if the *latter* appointment is illegal the *other* falls with it.

Certiorari to review proceedings of probate court of Kalamazoo county in appointing a special guardian for an alleged incompetent person. Argued June 8, 1887. Order of probate judge reversed January 26, 1888. The facts are stated in the opinion.

Hampden Kelsey, Dallas Boudeman, and *Frank E. Knappen,* for petitioner.

Howard & Roos and *E. M. Irish,* for respondent.

PER CURIAM. We granted a writ of *certiorari* to bring up the record in the probate court for the county of Kalamazoo, in the matter of the proceedings of the judge of probate of that county in appointing a special guardian of George R. Bassett, an alleged incompetent person.

The probate judge has made return to the writ, from which it appears that on the ninth day of February, A. D. 1887, one Louisa S. Bassett applied by petition to said judge, asking that a general guardian be appointed of the person and estate of George R. Bassett. She represented that she is an aunt of said George R. Bassett; that he is of the age of 21 years or thereabouts, and is an inhabitant or resident in the county of Kalamazoo, and is possessed of real estate situate in said county and elsewhere of the estimated value of $50,000 or thereabouts, as petitioner is informed and verily believes. She further, in her petition, represented that it is necessary that a guardian of the person and estate of the said George R. Bassett be appointed, for the following reason,

Digitized by Google

viz.: That said George R. Bassett is mentally incompetent to have the care and management of his said property; that he has been, from boyhood up, of feeble health, and that his mental condition has never been normal; that he came of age on the thirteenth day of October last, and that since said time he has steadily squandered his property and wasted his estate, and that he is continually wasting the same, and is a person of feeble mind at the present time.

The petition does not state the names of the nearest of kin, or other persons interested in said estate, who would be heirs in case of the intestacy of said George R. Bassett.

The judge of probate, acting upon this petition, appointed a time of hearing, and ordered notice to be served upon Bassett, the alleged incompetent.

Bassett filed an answer, asserting that the court had not acquired jurisdiction by the filing of the petition, denied the allegations of the petition, and denied the right or power of the probate court to appoint any guardian over his person or property. A hearing was had, and proofs taken, and the probate judge thereupon made an order as follows:

"It is ordered and decreed that James B. Cobb be, and he is hereby, appointed guardian of said George R. Bassett; and it is further ordered that said James B. Cobb file a bond in the penal sum of five thousand dollars, with sufficient surety to be approved by said court, before entering upon the discharge of his duties as such guardian, and that upon filing and approval of such bond letters of guardianship issue to him in the usual form."

An appeal was taken by Bassett from this order to the circuit court. Thereupon Louisa S. Bassett presented a petition to the probate judge for the appointment of a special guardian pending the appeal. In this petition she set out that she is a sister of the deceased father of said George R. Bassett, and that he has no father, mother, brother, sister, child, nor children. She also set out the appointment of the general guardian, and the appeal taken from the order

Digitized by Google

to the circuit court of the county of Kalamazoo, and the reasons why a special guardian should be appointed pending the appeal.

This application was met with a motion to dismiss the petition, and all proceedings under it, for 18 reasons, of which a few only will be noticed here.

The *first* is based upon the insufficiency of the petition for the appointment of a guardian to confer jurisdiction, and for not complying with the provisions of the statute in regard to the appointment of special guardians.

Second. That the petition does not show that Louisa S. Bassett is such a relative as is contemplated by the statute, who is authorized to make such application, or that she is such a person as would inherit any of the property of George R. Bassett if he should die intestate.

Fourth. Because the petition does not show, by facts and circumstances, that George R. Bassett is a mentally incompetent person, nor set forth the causes of the alleged incompetency.

Fifteenth. That the original petition for the appointment of a general guardian is void, and confers no jurisdiction on the court to appoint a general guardian, and that the alleged appointment of a general guardian is void.

Section 6314, How. Stat., provides:

"When the relations or friends of any insane person, or of any person who, by reason of extreme old age or other cause, is mentally incompetent to have the charge and management of his property, * * * shall apply to the judge of probate to have a guardian appointed for him, the judge shall cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than fourteen days before the time so appointed."

The statute does not state what the application shall contain, but manifestly it must contain a statement of facts which will authorize the appointment to be made, and it must upon its face appear to be made by the persons named in the statute. The petition should show all persons who will be affected by the action sought to be taken; and this

Digitized by Google

would manifestly include the presumptive heirs at law and distributees.

In the case of a married man, no one is so deeply interested as his wife, and children, if they have any, inasmuch as the appointment of a guardian interferes directly with the control and possession of the household. No action which so interferes can be proper without bringing before the court the persons liable to be so affected; and, while it may be proper for any near heir presumptive to make the application, it should show how far there are other persons concerned in the action sought.

In this case Bassett was a married man, and his wife was living, and the person most nearly related to him, and most to be affected by the proceedings. She is not, however, mentioned in the petition, nor does the fact that Bassett was a married man appear therefrom. The petition was defective in not stating this fact. The importance of this is more manifest when we consider that in cases of this kind the guardian appointed by the judge of probate controls both person and property. *Taff v. Hosmer*, 14 Mich. 255; How. Stat. § 6316.

This petition is not open to the objections discussed *In re Brown*, 45 Mich. 326 (7 N. W. Rep. 899), and *In re Storick*, 64 Id. 685 (31 N. W. Rep. 582). In the *Brown Case* the petition failed to state that the person whom it was sought to place under guardianship was mentally incompetent, but merely set forth that he was incompetent to have the care and management of his property. It was held that the petition was insufficient; that the incompetency set out in the petition is not necessarily mental incompetency; that the statute contemplates the existence of insanity, or of mental infirmity that is equivalent in destroying mental competency.

In the *Storick Case* the petition represented that it was

Digitized by Google

necessary that a guardian be appointed for the following reasons, viz.:

"That she is feeble in body and mind, so that she is not able to manage her business affairs with a proper degree of judgment and skill; her mind being so weak that she can be influenced by others in any direction they may see fit to lead her, even right against her own interest, and the interest of her family, and can, by any person almost, be induced to part with her property without just compensation therefor."

There was no allegation that she was mentally incompetent to have the charge and management of her property, nor any statement equivalent thereto. It was said, in deciding that the petition was insufficient, that the statute—

"Applies to those whose mind is so affected as to have lost control of itself to such a degree as to deprive the person afflicted of sane and normal action. Unless the petition either follows the words of the statute, or uses language and states facts fully equivalent, it cannot give jurisdiction."

In this case the petition states—

"That it is necessary that a guardian of the person and estate of the said George R. Bassett be appointed, for the following reason, viz.: That said George R. Bassett is mentally incompetent to have the care and management of his property."

This is substantially the language of the statute, and raises an issue which is to be determined by the probate judge. What follows the substantial allegation in the petition does not detract from the reason given, nor modify the statement made of the mental incompetency of the said George R. Bassett to have the charge and management of his estate. They are simply illustrations of the effect of his mental incompetency, and might have been omitted without detriment to the legal sufficiency of the petition to confer jurisdiction.

The order appointing the general guardian is not the order authorized by the statute. It merely appoints James B. Cobb guardian of George R. Bassett, and does not appoint

Digitized by Google

him guardian of his estate. It makes no mention of the estate. The statute provides (sec. 6315) that—

"If, after a full hearing and examination upon any such application, it shall appear to the judge of probate that the person in question is incapable of taking care of himself, and managing his property, he shall appoint a guardian of his person and estate."

It is clear that the judge of probate had no authority to appoint a guardian over the person, and not of the estate; neither could he appoint one over his estate, and not over his person. The proceedings are special, and in their nature summary, as well as being purely statutory, and, where they involve the citizen in the deprivation of both liberty and property, they must be strictly complied with.

In the case of *North v. Joslin*, 59 Mich. 647 (26 N. W. Rep. 810, 820), in speaking of the order appointing the guardians, it was said:

"Neither was there ever any decree made by the judge of probate adjudging Mrs. North to be mentally incompetent to take care of herself and manage her property. This was necessary, and the adjudication should appear of record."

See authorities there cited. The order in this case contains the same infirmity. There is no adjudication or decree adjudging George R. Bassett to be incapable of taking care of himself and managing his property.

It follows that the order of the probate judge appointing a special guardian over said George R. Bassett must be reversed and set aside, for the reason that the proceeding to appoint a special guardian is purely ancillary to that of appointing a general guardian; which appointment, it appears by this record, is not in compliance with the statute in such cases made and provided.

No costs will be allowed in this Court.

SHERWOOD, C. J., did not sit.

Digitized by Google

68	355
f126	484
126	485
126	486
68	355
e135	187

FRANCIS F. PALMS AND MICHAEL W. O'BRIEN (APPELLANTS), AND CLOTILDE PALMS (APPELEE), v. CHARLES L. PALMS, MARTHA C. PALMS, BERTHA A. PALMS, VIOLA PALMS, CORINNE PALMS, FRANCIS PALMS, AND WILLIAM J. PALMS (APPELLANTS).

Construction of will—Perpetuities—Royalties under mining leases.

The *final* decree in this case holds that the will and codicil, and each and every of the provisions thereof, are valid and effectual, and to be executed and carried out by the trustees therein named, according to the said several provisions, *except* as hereinafter specified.

"The royalties under any mining leases heretofore executed by the said Francis Palms, or the trustees named in said will, or that may hereafter be executed by said trustees, shall be treated as *principal* in the same manner as moneys received from the sale of real estate during the minority of the youngest grandchild of the said Francis Palms, living at the time of his decease, and that any and all questions that may or can arise touching the disposition of royalties accruing upon mining leases *after* the majority of such youngest grandchild, shall in no way be affected by this decree; but the issue shall be open for consideration and adjudication as though this decree had not been rendered.

"That, in like manner, all questions that may or can hereafter arise under the tenth clause of said will after the death of Francis F. Palms and Clotilde Palms as to the right or power of the remaining trustee, or trustees that may be appointed, to retain or manage the share of any grandchild of said testator until such child shall be of age, shall in no way be affected by this decree; but the same shall be open for consideration and adjudication as though this decree had not been rendered."

Appeal from Wayne. (Jennison, J.) Argued June 7, 1887. Decided February 2, 1888.

Bill filed to construe a will. Francis F. Palms and

Digitized by Google

Michael W. O'Brien, complainants, and *all* of the defendants appeal from decree holding the will void, etc. Decree reversed, and one entered as set forth in head-note. The facts are stated in the opinion.

Thomas M. Cooley and *C. A. Kent*, for Clotilde Palms.

Otto Kirchner and *Ashley Pond*, for Francis F. Palms and Michael W. O'Brien.

John Atkinson, for defendants.

Isaac Marston, for infant defendants.

MORSE, J. Francis Palms, a resident of the city of Detroit, on the twenty-sixth day of July, 1884, duly executed the following as his last will and testament:

"I hereby give, devise, and bequeath all my property to Francis F. Palms, Clotilde Palms, and Michael W. O'Brien, as trustees, and in trust for the uses and purposes following, to wit:

"1. To collect all rents and other moneys owing to my estate; to sell, lease, repair, and improve any of my property; to invest and re-invest the proceeds thereof in lands in the city of Detroit, and interest and dividend paying securities; and to do all acts and to pay all necessary expenses for the care, protection, and management of my estate that I might do if alive.

"2. To pay five thousand dollars to my brother, Ange Palms.

"3. To pay one thousand dollars to the Little Sisters of the Poor of Detroit.

"4. To pay one thousand dollars to the Saint Vincent Female Orphan Asylum of Detroit.

"5. To pay, semi-annually, one-half of the net income of my estate to my son, Francis Palms, during his life, and the other half to my daughter, Clotilde Palms, during her life.

"6. Upon the death of my son, to pay one-half of the principal of my estate to his children, in equal portions. If no issue survive him, then the same to be paid to the children of my daughter upon her death.

"7. Upon the death of my daughter, to pay one-half of the principal of my estate to her children, in equal portions.

Digitized by Google

If no issue survive her, then the same to be paid to the children of my son upon his death.

"8. Upon the death of either of my children leaving no issue, the entire net income of my estate shall be paid to my surviving child during his or her life.

"9. If any of my grandchildren die before their father (he being my son), or before their mother (she being my daughter), leaving issue, such issue shall be entitled to the share of such grandchild.

"10. The share of any grandchild who may be a minor upon the death of his father (he being my son), or of his mother (she being my daughter), shall remain a part of said trust-estate, and under the management of said trustees, until such child shall be of age. In that case said trustees shall make such allowance as to them may seem proper for the support and education of such grandchild.

"11. I hereby appoint Frederick E. Driggs as trustee of my estate, to fill the vacancy which may be made by the death, resignation, or incapacity of either of my said trustees, giving him the same interest and estate, and the same power and authority, as is hereby given to the trustees first herein named.

"12. If either of my children contest this, my will, and seek to have the same declared invalid, such child shall receive no portion of my estate, and in such case I direct that the whole net income thereof be paid to my other child during his or her life.

"13. I hereby appoint Francis F. Palms, Clotilde Palms, and Michael W. O'Brien the executors of this my will.

"In witness whereof, I, the said Francis Palms, have hereunto set my hand this twenty-sixth day of July, 1884.

"FRANCIS PALMS.

"Signed and declared by the said Francis Palms as and for his last will and testament in the presence of us (both being present at the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

"HENRY H. SWAN, Detroit, Michigan.

"ELIJAH W. MEDDAUGH, Detroit, Michigan."

On the third day of September, 1886, he duly executed the following codicil:

"I, Francis Palms, of Detroit, Michigan, having made my last will and testament, bearing date the twenty-sixth day of

Digitized by Google

July, 1884, do now make this codicil to be taken as a part of the same:

"*First.* I do hereby ratify and confirm said will in every respect, save as far as any part of it is inconsistent with this codicil.

"*Second.* I hereby direct that the royalties and other moneys received from leases of mineral lands, whether such leases be made by me during my life, or by my executors and trustees after my death, shall be considered as a portion of the capital of my estate, and shall be invested as such by my executors and trustees. The income derived from such capital to be paid to my children as in my will provided. The accumulation from this source not to continue longer than the minority of my grandchildren now living, after which the royalties and income from mineral lands shall be paid to my children.

"*Third.* I hereby remove the restriction in my will directing the executors and trustees to invest and re-invest the proceeds of my estate and lands in the city of Detroit, and interest and dividend paying securities, and hereby authorize my said executors and trustees to make such investments as in their judgment may be for the best interest of my estate.

"*Fourth.* If either of my children contest this codicil to my will, and seeks to have the same declared invalid, such child shall receive no portion of my estate, and in such a case I direct that the whole net income thereof be paid to my other child during his or her life.

"*Fifth.* It is my wish that my executors and trustees be not required to give bonds.

"In witness whereof, I, Francis Palms, have, to this codicil to my last will and testament, subscribed my name this third day of September, 1886, at said Detroit.

"FRANCIS PALMS.

"Signed and declared by the said Francis Palms as and for a codicil to his last will and testament, in the presence of us (both being present at the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

"E. W. MEDDAUGH, Detroit, Michigan.
"HENRY H. SWAN, Detroit, Michigan."

Francis Palms died at Detroit, November 24, 1886, leaving an estate valued at several millions of dollars. The will and codicil above set forth were duly probated and allowed as

Digitized by Google

the last will and testament of said deceased, and the executors duly qualified and entered upon their trust under it. In the early part of the year 1887 the executors filed their bill in the circuit court for the county of Wayne, in chancery, to obtain a construction of its provisions. The defendants in the suit are the minor children of Francis F. Palms, one of the executors, and a son of the deceased.

The complainants pray the court to determine and declare:

"*a*—Whether the trust expressed in and by said will, and vested in your orators and oratrix, is in conformity with the laws of this State, and particularly whether said will violates any of the provisions contained in chapters 213–216 of Howell's Annotated Statutes, and, if so, how far and wherein.

"*b*—Whether, if said trust conflicts with any law of this State so far as it relates to real property, it is also void so far as it relates to personal property.

"*c*—Whether said trust, so far as it extends beyond the life of your orator Francis F. Palms, and your oratrix, Clotilde Palms, violates any laws of this State, and, if so, how far, and whether such conflict, if any there be, affects the validity of said trust during the life-time of your orator Francis F. Palms, and your oratrix, Clotilde Palms, or during the life-time of either of them.

"*d*—Whether the provisions contained in the second paragraph of said codicil are in conflict with the laws of this State.

"*e*—Whether there is any other legal objection to said will or codicil.

"3. That your orators and oratrix may receive such further directions touching the meaning and effect of the several provisions contained in said will as shall seem meet to this court, and that if such trust is void, wholly or in part, they may be relieved therefrom so far as it is void.

"4. That they may receive such further relief and such other relief as may be agreeable to equity."

The court below decreed that the trust-estate devised by the will was void as contrary to law, and that the estate mentioned in said will and devised therein to the trustees, both real and personal, descended to the heirs as to the realty, and to those entitled under the statutes as to the personalty; and also declared that the clause in the codicil directing the accumulations of the royalties and other income of the min-

Digitized by Google

eral lands, of which the testator died seized, was also void as contrary to law.

All the defendants, and the complainants Francis F. Palms and Michael W. O'Brien, appeal from this decree to this Court.

Clotilde Palms is represented by counsel seeking to uphold the decision of the Wayne circuit, in chancery.

The various questions presented to the court by the bill in this cause were ably and elaborately argued before us by counsel of eminence and ability, but it seems to me that the solution of the main question does not involve many of the questions discussed before us. And the case, in my opinion, does not depend at all upon the amount of money involved or the magnitude of the estate.

If it be true that the accumulation of a great fortune by a single individual is a public misfortune and against public policy, yet, nevertheless, the power to govern that fortune and direct its course after the death of the owner, by *ante mortem* disposition, must be, under our laws and the policy of our institutions, identical with the authority of the poorer man to dispose by will of the few hundred dollars that he may have saved during his life-time. The law in this regard knows, and should know, no difference between the rich and the poor. Indeed, it could make no distinction of this kind without special legislation, contrary to our Constitution and the theory of our government.

The will of Francis Palms must, then, in the outset, be considered and tested as any other will would be, without reference to the amount it bequeaths or places in the hands of trustees. Much of the argument of counsel has been directed to theories and purposes of government as regards the accumulation and holding of vast estates, which, though correct in the abstract, in my mind have no place in this discussion, and can and should have no influence whatever in determining the validity of the trust or trusts contained in

Digitized by Google

this will. If this will would be valid if only one hundred dollars was involved, it must also be valid if it disposes of ten millions.

It is the wise and beneficent purpose of the courts, if possible, to uphold and sustain wills when there is no doubt whatever of the sanity and perfect competency of the testators to make them, and that they were executed without duress or any undue influence.

It is also considered the duty of the courts to so interpret the conditions of a will, where there is any obscurity or ambiguity of expression, as to carry out the intention of the testator, when such intention can be plainly gathered from the whole body of the instrument, and is a legal one.

And when the intent is manifest, and there are separate trusts or provisions which are not so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated or nullified if one were held legal and others illegal, and the legal can be separated from the illegal without doing injustice to any of the legatees or beneficiaries under the will, as their rights are indicated by the wishes of the testator therein expressed, the illegal trust may be cut off, or the invalid provision eliminated, and the legal one permitted to remain; thereby effectuating, as far as the law will permit, the will of the maker of the instrument.

In this case there is no question raised as to the competency of Francis Palms when he executed this will and codicil; nor is it claimed that any one influenced him in it It is admitted that it is the will and wish of a strong man, put in the very shape he wanted it, and marked and impressed throughout with his individual characteristics as a money-getter and money-saver.

One of the main objections to the validity of the trusts created is that this man, not satisfied with the building up of a vast estate in his life-time, sought to erect and maintain,

Digitized by Google

after his death, a great family inheritance; that he endeavored to extend the great power of his mind for accumulating riches too far into the future after his death, and to virtually handle his great property intact for too long a period beyond the grave, in opposition to the statute and the policy of our laws, and "the genius of a free, and especially of a commercial, people."

The intent of the testator is plain and unequivocal. In reality, leaving out a few small bequests, he divides his estate into two equal portions, the income of one portion to be enjoyed by his son, Francis F. Palms, the other by his daughter, Clotilde. This division and separation runs clear through all the provisions of the will, and thus, in the beginning, two distinct trusts are created. When Francis F. dies, the half upon which he has received the income becomes absolutely the property of his children, if any survive him, or the issue of any of them. If no issue survive him, it goes to the children of Clotilde, if any survive her. But the share of each is not to be paid until he or she is of age. It remains until then in the hands of the trustees. Upon the death of Clotilde, the other half goes to her children, if any survive her; if no issue survive her, it falls to the issue of Francis F. If either Francis F. or Clotilde die without issue, and the other survives, the whole income is paid to the survivor during his or her life, and the distribution of such half is postponed during that period.

The wish of the testator was to give his children only a life-estate, and to bequeath the fee to his grandchildren or their issue. It is plain that he did not intend that either Francis F. or Clotilde should inherit the body of the estate. And under the authorities the devise of the income to them for life, although embraced in a single paragraph, is, by the well-settled construction of similar clauses, a devise to each in severalty of a life-estate in one-half of the property. *Monarque v. Monarque*, 80 N. Y. 320; *Savage v. Burnham*,

Digitized by Google

17 Id. 561; *Everitt v. Everitt*, 29 Id. 39; *Stevenson v. Lesley*, 70 Id. 512; *Wells v. Wells*, 88 Id. 323; *Manice v. Manice*, 43 Id. 378; *Gilman v. Reddington*, 24 Id. 10. See, also, *Earl v. Grim*, 1 Johns. Ch. 494; *Schermerhorne v. Schermerhorne*, 6 Id. 70; *Moore v. Hegeman*, 72 N. Y. 376; *Purdy v. Hayt*, 92 Id. 447; *Tiers v. Tiers*, 98 Id. 568.

The decree of the court below cuts off the interest of the grandchildren, for whose benefit the will was made, and defeats the manifest intent of the testator. It creates a new will for him, radically different from his plainly expressed wish. This should not be unless the will as it stands is so perfectly repugnant to the law as to make it void *in toto*

It is claimed that the trust or trusts created by this instrument come within the statutes of this State against perpetuities, as found in chapter 213 of Howell's Statutes. The sections relied upon are as follows:

"Sec. 14. Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

"Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age."

If the tenth clause or paragraph in the will should be eliminated, there could be no possible claim that the trusts created by this will were invalid as within the statute. But, with this paragraph remaining and being a part of the instru-

Digitized by Google

ment, there is a possibility of an infraction of the law, if the trusts are carried out as therein directed.

Let us take the case of the half of the estate upon which Francis F. is to receive the income during his life. This cannot be disposed of during his life, which is one life. But upon his death each of his children of age takes absolutely his share immediately, and the others as soon as they are of age. Here is a separate trust for each of these children, none of which come within the inhibition of the statute. Only in case Francis F. leaves no child or the issue of any of his children surviving him at his death, does any part of this half of the estate fall under the ban of the law against perpetuities.

It is not an uncommon thing for a man to will only a life-estate to a child, and pass the fee to his grandchildren. It is done without question, and is lawful. The vastness of this estate cannot hamper or abridge the right that the law gives to all to thus dispose of property. That such a possibility of the seven children of Francis F. dying without issue before the death of their father exists cannot be denied, as all things are possible where death is concerned, but such a contingency is a very doubtful and most improbable thing. It would not be either good sense or good law, in my opinion, to defeat the plain intent and scheme of this will *in toto*, and from the beginning, because of the possible but doubtful happening of a very remote and unlikely event, or rather a complication of such events.

To suppose that all these lives would be cut off and ended without issue before Francis F. dies; that he will also die before Clotilde, and that she will marry and have children surviving her, which contingencies must also happen,—is something far beyond the ordinary probabilities of life and death, even if it be within the possibilities. It would seem as if the special interposition of famine or pestilence alone could thus destroy before their time the seven children of

Digitized by Google

Francis F. Unless these improbable events take place, the trusts, as regards one-half of the property, are valid. The manifest intent, as before said, is that the grandchildren of the testator shall take the fee of the estate upon the death of the children,—two lives in being. And the supposed invalidity of the tenth clause of the will concerns the grandchildren wholly, and not Clotilde or Francis F. Palms, or any rights granted them by the plain terms of the instrument.

It must be conceded, I think, without doubt, if we look at the whole scheme of the will, that the testator intended that his grandchildren, the children of Francis F. Palms, should take the fee of one-half in equal shares of the principal of the estate, upon the death of their father.

It is contended that the whole scheme of this will was to tie up and take out of the ways of business and commerce this great estate, and keep it intact as long as the law would admit; and that, in his eagerness to do so, in his intense desire to build up and maintain his family pride, in holding together this large amount of property, the testator stepped over the limits of the law; that his scheme is not the scheme of the will, unless such will can be carried out to the full extent that the remotest and most improbable event or events may lead to; and that, such unlikely possibilities or contingencies bringing the will under the ban of the statute, it must be determined that the whole scheme was built upon these possibilities, and must fall with them, and the estate be divided as if there had been no will.

I do not think so. In the first place, I cannot discern any particular or all-absorbing scheme or desire to build up, maintain, and hold together a great estate for any purpose or family pride, or to take the same out of the channels of trade and commerce. The trustees are authorized in the will to sell, lease, or repair any of the property; to invest and re-invest the proceeds of sales in lands, and in interest and dividend paying securities, and "to do all acts * * *

Digitized by Google

that I might do, if alive." And in the codicil the restriction as to the investments is taken away, and the trustees are empowered to make such investments as in their judgment may be for the best interests of the estate. The trustees can be constantly buying and selling, changing daily, if they see fit, the nature and character of the property intrusted to their care. The avenues of trade and business are open to them, as open as they would be to the natural heirs, provided no will had been made, except the property, if the trust is fulfilled, cannot be squandered foolishly, spent in riotous living, or thrown broadcast upon the street for passers-by to pick up.

The will is nothing more nor less than a direction to the trustees to keep and manage this property, prudently and judiciously, for the grandchildren, who take upon the death of the children.

It is argued that the policy of the law invites the immediate breaking up of large estates, and a general division as soon as possible of the money, so that it can be thrown out to the commons, and gathered up in small portions by the lucky ones who may have the opportunity of so doing, so that the wealth of the country may be as evenly distributed as possible. Granting that this may be so, there is as yet no law that imposes upon any man the duty of placing his earnings and savings at his death in the hands of those who will squander and dissipate them the quickest, nor any prohibition against his passing by his children, and bestowing his fortune upon his grandchildren, even if by so doing he keeps such fortune intact while his children live. If it were not for the direction in this tenth clause that the share bequeathed to each grandchild shall not be paid to such grandchild until he or she becomes of age, no one would pretend to deny the complete validity of this will.

I can see in this provision no desire to hold this estate together for the purposes claimed by the counsel for Clotilde.

Digitized by Google

Upon the death of Francis F., or Clotilde, if she have issue, the grandchildren who are of age take at once their shares out of the common whole, and the estate is thereafter lessened one share as the minority of each of the remaining legatees is ended. The testator plainly contemplated a segregation of the share of each grandchild, when of age, from a general mass after the death of the children, and a payment to such grandchild of such share. Each share, as it is liberated and paid over, will be released from the trust. The interests carved out of the trust are separable and distinct, and the will is to be construed as though in terms it had created a separate trust for each grandchild, and the issue of such grandchild. *Savage v. Burnham*, 17 N. Y. 571; *Everitt v. Everitt*, 29 Id. 39; *Stevenson v. Lesley*, 70 Id. 512; *Monarque v. Monarque*, 80 Id. 320; *Wells v. Wells*, 88 Id. 323, 333.

In relation to this provision, the testator evidently intended that the father and aunt of these beneficiaries, or their mother and uncle, if Clotilde should have issue, together with others, in whom he had confidence, should without bonds manage the share of each in the estate until the law would permit them to handle it themselves. If this tenth clause had not been inserted in the will, none of these grandchildren could have entered upon the management or possession of their share of the estate until of age. The law would place such share in the hands of a guardian, who could not alienate the real estate, except upon the order of a competent court for good reasons shown, as provided by the statutes of our State. The property would in such case be tied up more effectually than if it remained in the hands of the trustees under the will, with the power to sell and buy daily given them in such instrument. I can see in this provision only a desire on the part of Francis Palms to grant his property in fee to his grandchildren, and to guard and protect it against waste and dishonesty until they were each able, under the

Digitized by Google

law, to possess and manage it themselves. It is no more in effect than appointing guardians for them, which, if he had been their father, he might have done by will under the statute. How. Stat. § 6311 (Amend. Laws of 1883, p. 2).

This wish to guard, protect, and save the share of each grandchild animates the whole will. Such a wish is laudable and praiseworthy, and should not be defeated or impaired unless of necessity. No man who has watched the courts, and seen the too often futile attempts of such beneficiaries as these to regain their inheritance, wasted by fraud or squandered without reason, can wish the law to be otherwise than an encouragement and protection to a father or grandfather who seeks to preserve to his blood the property that a life of toil and sacrifice has earned and saved, if his effort to do so is confined within reasonable limits, as in this case. I think that if the remote possibility shall occur that this tenth clause of the will shall infringe upon the statute by the continuance of any of the several trusts beyond the two lives in being of Francis F. and Clotilde Palms, and if it should cover property illegally restrained from alienation, it can and should be treated as eliminated and void as to the share or shares of those who shall not have arrived at age at the time of the expiration of such lives. This can be done without interfering with or destroying the main purpose and intent of the testator. The main object of this will, as heretofore said, was to grant only a life-estate to his children, and the fee in equal shares to his grandchildren. This purpose is not to be defeated or nullified because he went further, and, as an incident of the main purpose, undertook to protect the minor beneficiaries until they were capable under the law of possessing and using the property absolutely as their own. If such desired and expressed protection should by any possibility reach over the limits of the law, it can be lopped off under all the authorities.

Upon the death of Francis F. Palms with children living,

Digitized by Google

there can be no trouble as to one-half of the estate. If he should outlive all of his children and their issue, and Clotilde should marry and be living with issue at his death, then her children should take this half at her decease in fee, discharged of the trust imposed by this tenth clause. In relation to the other half of this estate, if Clotilde should die without issue before Francis F., his children should take, as if this tenth clause were eliminated, at his death, the fee absolute of this half. If Clotilde should marry, and have living issue at her death, the same principle would govern as in the case of Francis F., heretofore stated, and the statute would not be violated with the tenth paragraph remaining as a part of the will. Also if she has no issue, and outlives her brother, the statute is not infracted by the terms of the will as it now stands. This half would in such case be incapable of alienation during her life, and on her death, during the possible minority of some of the issue of Francis F., which would be but two lives in being, counting the minority as one life.

I find in this will a separate trust for every grandchild. Those who are of age upon the death of their parent take at once an absolute fee under the will as it stands. As to them the will is a valid one. The trusts as to them cannot be invalidated because of the provisions as to those who shall be minors at the decease of their father, in the case of the children of Francis F., or of their mother, if Clotilde has children. *Purdy v. Hayt*, 92 N. Y. 446, 454–458; *Tiers v. Tiers*, 98 Id. 568; *Kennedy v. Hoy*, 105 Id. 134, 137 (11 N. E. Rep. 390); *Van Schuyver v. Mulford*, 59 Id. 426; *Ward v. Ward*, 105 Id. 68, 76 (11 N. E. Rep. 373); *Van Vechten v. Van Veghten*, 8 Paige, 128; *Smith v. Edwards*, 88 N. Y. 104, 105; *Wilson v. Odell*, 58 Mich. 533 (25 N. W. Rep. 506); *Toms v. Williams*, 41 Id. 552 (2 N. W. Rep. 814); Gray, Perp. §§ 389, 391, 441.

As to these grandchildren who may be minors at the death

Digitized by Google

of the holders of the life-estate, and in whose case, by some of the possibilities heretofore stated, the clause that the trust shall continue until they shall become of age may come in conflict with our statute against perpetuities, and if it should, they must take, in my opinion, under the authorities, the fee at once discharged of the invalid trust. This limitation of their right to possess and enjoy their share of the estate is an ulterior one, and depending upon a possible contingency which may never happen. It does not affect the primary purpose of the will or the trust in their case. The rule is well settled that such a limitation, though invalid, will not be allowed to defeat the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of the limitation of the legal estate. *Harrison v. Harrison*, 36 N. Y. 543; *Savage v. Burnham*, 17 Id. 561; *Manice v. Manice*, 43 Id. 303; *De Kay v. Irving*, 5 Denio, 646; *Knox v. Jones*, 47 N. Y. 389; *Tiers v. Tiers*, 98 Id. 568; *Toms v. Williams*, 41 Mich. 567 (2 N. W. Rep. 814); Gray, Perp. § 247. Therefore it is my conclusion that the trusts expressed in said will are valid and in conformity with the laws of this State, except in the unlikely contingencies heretofore noted; and that, if any of such possibilities may happen, such an event or events cannot and do not affect in any way the validity of the trusts during the lifetime of either Francis F. or Clotilde Palms. And in such case or cases the tenth clause of the will, so far as conflicting with the statute, must be treated as a nullity, and no part of the will.

The personal property coming within the trusts is governed in this State by the common-law rule, which limits the suspension of the power of alienation to the period of any life or lives in being and 21 years afterwards. The trusts here cannot extend beyond two lives in being, and the minority of any grandchild after the death of the testator's son and daughter. Gray, Perp. § 171; *Toms v. Williams*, 41 Mich.

Digitized by Google

562 (2 N. W. Rep. 814); *Wilson v. Odell*, 58 Id. 536 (25 N. W. Rep. 506).

The remaining question to be disposed of is in relation to the validity under our laws of the second paragraph of the codicil. Unless the royalties and other moneys received from leases of mineral lands can be treated as a part of the price for which lands are sold, the accumulation therein directed is unquestionably void. Such accumulation is to commence at once, and may be for the benefit of persons not yet in being. How. Stat. § 5553. It is insisted by counsel, in favor of the validity of this clause in the codicil, that royalties are in no sense rents; that the moneys to be received upon the leases of mineral lands are not paid—

"For the use of the lands, but for what must be regarded as an integral part of the land, or as property covered up by and concealed in the earth."

They are neither rents nor profits.

At the time of the death of the testator there were no open mines upon any of his lands, but, 14 days before his death, he made a mining lease of the iron ore upon 160 acres of land, located in the Upper Peninsula. The lease ran for 20 years, and provided for the payment of a royalty of 75 cents upon every gross ton, 2,240 pounds, of iron ore mined upon the premises. The testator, by the terms of the codicil, evidently contemplated that this ore to be mined was a part of the capital of his estate. The question for us to determine is whether this ore, so to be taken out and carried away, is in law sold in this lease as timber would be sold, or whether the royalty to be paid can be considered as the rent or profit of the land.

It seems to me that the royalty to be received upon this lease is simply a sale of the ore, which is a part of the land, and of the value of the land. If the land, any certain description of it for instance, is worth $10,000 more because

Digitized by Google

there is iron ore upon or under it than it would be without it, or if the whole value of such land should be the ore it contains, as is sometimes the case, then the taking out of the ore eats out daily the value of the land, and in fact, in the end, destroys it. The lessor sells in one instance the chief part of the land, and in the other the whole of it in reality, as what is left is not worth the payment of taxes upon it. It is nothing more nor less than the sale of all the iron ore in the land that can be taken out in 20 years, as one would sell all the pine timber that could be cut and taken off within a certain period. These leases are so regarded in Pennsylvania, and the royalties treated as part of the real estate. *Fairchild v. Fairchild*, 9 Atl. Rep. 255; *Stoughton's Appeal*, 88 Penn. St 198; *Scranton v. Phillips*, 94 Id. 15, 22; *Sanderson v. Scranton*, 105 Id. 469; *D., L. & W. R. R. Co. v. Sanderson*, 109 Id. 583 (1 Atl. Rep. 394); *Hope's Appeal*, 3 Atl. Rep. 23.

But it is also claimed that, in any event, this clause of the codicil is void because it directs that the accumulation shall continue during the minority of the grandchildren now living, seven in number, and therefore illegally suspends the power of alienation beyond two lives in being, counting the minorities as lives. This fund received from the royalties must be treated, under my view as heretofore stated, the same as moneys derived from the sales of real estate. It does not come under the prohibition against the accumulation of rents and profits found in sections 5553 and 5554 of Howell's Statutes. Therefore, under this codicil, the children take a life-estate in the proceeds obtained by the royalties, the same as under the will they take the life-estate in the general body of the property. The only effect of this codicil is to turn over to them, in case they or either of them outlive the minority of the youngest grandchild now living, a part of the fee of the estate, so much thereof as thereafter during their lives, or the life of one, shall be obtained by

Digitized by Google

royalties. If this clause of the codicil shall be declared void, it would be a detriment possibly, rather than a benefit, to Francis F. and Clotilde Palms. Under it they may receive a part of the capital of the trust-estate; without it, these royalties must be preserved as a part of the *corpus* of the estate to pass to the grandchildren in fee as does the other property. It will be noticed that this codicil does not direct that this accumulation shall continue absolutely to the end of the minority of the youngest grandchild.

"The accumulation from this source *not to continue* longer than the minority of my grandchildren now living, after which the royalties and income from mineral lands shall be paid to my children."

The true construction of this codicil is that he meant that these royalties should be treated and used as a part of the capital of the trust fund, and to be divided among his grandchildren the same as the other property, except in case those living became of age before his children died, then the children to have the royalties, gaining so much of the property absolutely and in fee. Even in that case the distribution of these royalties would not be postponed at all beyond that of the other property. Therefore, unless these living grandchildren all become of age before the death of both Francis F. and Clotilde Palms, the maintenance or rejection of this clause of the codicil can make no difference in the disposition of the estate.

Although, individually, I am inclined to hold this clause of the codicil, if such contingency should arise, void, so far as I have been able to investigate the question, yet I do not consider it, regarding the royalties as not rents and profits, at all material until such possibility occurs, because it cannot until then affect in any way the disposition or distribution of the estate, as such royalties go with the body of the property, and will be governed by the rules laid down as to that, in our view of the construction of the will. When the contingency

Digitized by Google

arises, if it ever does, the opinion of the court can be taken upon the validity of this clause of the codicil, if those interested should find the interest obtained by reason of the royalties of sufficient value or importance to ask a construction thereof.

In considering this case, we have assumed that there was real estate on which the power of alienation was restrained. So far as the will covers personalty, no part of it is within any statute or common-law prohibition. But under this will all the realty is subject to sale by the trustees, and, if any but contingent interests were involved in doubt, we should be called upon to decide whether the will really creates any restraints at all. This question was not as fully argued as we should like to have it, if it were necessary for our decision. But as it is a very remote contingency that trusts will have to be executed for any one after the expiration of the two life-tenancies, it would be going further than is desirable to give a decision upon interests that do not now exist, and may never exist, so as to bind persons who cannot be identified.

The decree of the court below must be reversed, and the trusts be declared valid throughout, except so far as any controversy may hereafter arise under the tenth clause of the will, or the second clause of the codicil, in the contingencies pointed out in this opinion; such controversies to be hereafter settled when they arise.

The costs of the litigation to be taxed against the estate of Francis Palms, and to be paid out of the income thereof.

CAMPBELL, J, concurred with MORSE, J.

CHAMPLIN, J. On the twenty-sixth day of July, 1884, Francis Palms, a resident of Detroit, Michigan, duly made, published, and declared his last will, in and by which he gave, devised, and bequeathed all of his property to Francis F. Palms, Clotilde Palms, and Michael W. O'Brien, as trustees, and in trust for the uses and purposes therein declared.

Digitized by Google

By the first clause the trustees were directed and empowered to collect all rents and other moneys owing to the testator's estate; to sell, lease, repair, and improve any of his property; to invest and re-invest the proceeds thereof in lands in the city of Detroit, and interest and dividend paying securities; and to do all acts and to pay all necessary expenses for the care, protection, and management of his estate that he might do if alive.

By the second, third, and fourth clauses of his will he directed certain specific legacies to be paid.

By the fifth clause he directed his trustees to pay, semi-annually, one-half of the net income of his estate to his son, Francis Palms, during his life, and the other half to his daughter, Clotilde Palms, during her life.

By the sixth clause he directed that upon the death of his son his trustees should pay one-half of the principal of his estate to his son's children, in equal portions. If no issue survived him, then he directed the same to be paid to the children of his daughter upon her death.

By the seventh clause he directed that upon the death of his daughter his trustees should pay one-half of the principal of his estate to her children, in equal portions. If no issue survive her, then the same to be paid to the children of his son upon his death.

By the eighth subdivision of his will he declared that, upon the death of either of his children leaving no issue, the entire net income of his estate should be paid to his surviving child during his or her life.

He further directed by the ninth clause that, if any of his grandchildren die before their father (he being his son), or before their mother (she being his daughter), leaving issue, such issue shall be entitled to the share of such grandchild.

By the tenth clause he declared that the share of any grandchild who may be a minor upon the death of his father, or of his mother, shall remain a part of said trust-

Digitized by Google

estate, and under the management of said trustees, until such child shall be of age. In that case the said trustees were directed to make such allowance as to them might seem proper for the support and education of such grandchild. The testator then provided for and appointed a trustee to fill any vacancy caused by death, resignation, or incapacity of the trustees named.

By the twelfth clause he declared that if either of his children contested the will thus made, and sought to have the same declared invalid, such child should receive no portion of his estate, and in such case he directed that the whole net income thereof should be paid to his other child during his or her life.

He then appointed his trustees executors.

On the third day of September, 1886, the testator made and published a codicil, by the second clause of which he directed that the royalties and other moneys received from leases of mineral lands, whether such leases were made by him during his life or by his executors and trustees after his death, should be considered as a portion of the capital of his estate, and should be invested as such by the executors and trustees; the income derived from such capital to be paid to his children as in his will provided. The accumulation from this source was not to be longer than the minority of his grandchildren then living (at the time the codicil was made), after which the royalties and income from mineral lands should be paid to his children. By the third clause of his codicil he removed the restriction directing the executors and trustees to invest and re-invest the proceeds of his estate in lands in the city of Detroit, and interest and dividend paying securities, and authorized his executors and trustees to make such investments as in their judgement may be for the best interests of his estate. He then made the same provision in case either child shall contest the validity of the codicil as that contained in the twelfth clause of the will.

Digitized by Google

On the twenty-fourth of November following the execution of the codicil Francis Palms died at Detroit. His will and codicil were properly presented to and were admitted to probate in the probate court of the county of Wayne. At the time of his death he had two children living, Francis F. Palms and Clotilde Palms. Clotilde Palms was of full age, and unmarried. There were seven children of Francis F. Palms living at the time of the testator's death, all minors. No other children or grandchildren or other issue of the testator were living at the time of his death. He left no widow. He died seized of real estate in this State worth over $1,000,000, and of personal estate worth over $100,000.

The executors and trustees named in the will qualified and entered upon their duties, but, entertaining doubts relative to the validity of some of the provisions of the will, filed their bill in the circuit court of the county of Wayne, in which the minor children of Francis F. Palms are made defendants, and pray as follows:

"1. That the defendants may answer this bill fully.

"2. That this court may declare by its final order and decree:

"*a*—Whether the trust expressed in and by said will, and vested in your orators and oratrix, is in conformity with the laws of this State, and particularly whether said will violates any of the provisions contained in chapters 213–216 of Howell's Annotated Statutes, and, if so, how far and wherein.

"*b*—Whether, if said trust conflicts with any law of this State so far as it relates to real property, it is also void so far as it relates to personal property.

"*c*—Whether said trust, so far as it extends beyond the life of your orator Francis F. Palms, and your oratrix, Clotilde Palms, violates any laws of this State, and, if so, how far, and whether such conflict, if any there be, affects the validity of said trust during the life-time of your orator Francis F. Palms, and your oratrix, Clotilde Palms, or during the life-time of either of them.

"*d*—Whether the provisions contained in the second paragraph of said codicil are in conflict with the laws of this State.

Digitized by Google

"e—Whether there is any other legal objection to said will or codicil.

"3. That your orators and oratrix may receive such further directions touching the meaning and effect of the several provisions contained in said will as shall seem meet to this court, and that if such trust is void, wholly or in part, they may be relieved therefrom so far as it is void."

The infants answered by their guardian *ad litem*, and submitted their rights and interests to the protection of the court.

Replication was filed, and proofs taked in open court, from which it appears that the testator, at the time of his death, was seized in fee of lands in Michigan, Wisconsin, and Texas; that his personal property consisted of bank, insurance company, manufacturing, railroad, and other corporation stocks, and various forms of interest-bearing obligations; that he owned what is known as mineral lands, situated in the Upper Peninsula of Michigan, but no mines had yet been worked; that he had executed but one lease of mineral lands, but no royalties had been received therefrom. This lease appears to have been executed October 15, 1886. It further appears that the net income from the estate exceeds $100,000 annually, and is likely to increase.

A decree was entered in the court below declaring the will and codicil wholly void as being contrary to law, and that the estate left by the testator descended to those entitled under the statute in cases of intestacy. From this decree the complainants Francis F. Palms and Michael W. O'Brien and all of the defendants appeal. The legatees were not made parties to the bill, and their interests have not been represented before the court.

In construing wills, it is well settled that the intent of the testator must be ascertained and carried into effect so far as it legally can be done. And the intent must be gathered from the whole will taken together. If it contains provisions which are prohibited by law, and those provisions are not

Digitized by Google

inseparably connected and interwoven with the general scheme of the testator, which otherwise is valid, and their rejection would not prevent the general scheme of the testator from being carried into effect according to his intention, then the valid portions of the will may be upheld, and the illegal portions declared void. Whether or not this case comes within the principle enunciated will be considered further on.

The will disposes of both real and personal property, and subjects both to the same trusts. Our statutes have modified the rules of the common law relating to what are called perpetuities, as connected with real estate, and we have adopted, but with slight variations, the Revised Statutes of New York upon the subject, with this significant exception: While the statutes of New York relate to and regulate the subject as applied to both real and personal property, ours have adopted only that portion relating to real property, and future interests connected therewith. The result is that we have two rules regulating the disposition of property,—one, the statute applying to real property; and the common law, to the creation of future interests in the disposition of personal property.

The difference between the two rules is material. By the statute, future estates in land, to be good, must take effect, if at all, within or at the expiration of two lives in being at the creation thereof, with a single exception not material to be mentioned here. By the common law no future interest, subject to a condition precedent, is good, unless the condition must be fulfilled, if at all, within 21 years after some life in being at the creation of the interest. Hence if the estate left by Francis Palms were entirely personal, no difficulty could arise with reference to that portion given to the children of Francis Palms. The distribution by the will to these children must, in any event, take effect within two lives in being and 21 years; for all his children must reach majority

Digitized by Google

if the lives upon which it is limited should die the next moment after the testator's death. The disposition does not conflict with the common-law rule as to perpetuities.

Had the will directed the real estate to be converted into personalty, it would in equity have been so treated, and the tenth clause would in that event have been valid. But the testator did not so direct. It authorizes investments to be made as the trustees shall deem for the best interests of the estate, and to lease, repair, and improve the property confided to their management, and contemplates that the trust property may remain real estate. Neither do I think it proper that the real estate and the personal property devised to the trustees, as it came to their hands, should be kept separate, in order to apply to each the rules controlling their disposition. The testator has placed it all in one trust, and subjected it to the same disposition. He has made no distinction, and I think it clear that we can make none for him. If, therefore, the trust as to any portion of the will must fail because unauthorized, it must fail to both classes of property.

The trusts contained in this will are express as well as active trusts, and, in so far as they are valid, vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the persons for whose benefits the trust was created take no estate or interests in the lands, but they may enforce the performance of the trusts in equity. How. Stat. § 5578. By another section of the statute it is provided that no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest. How. Stat. § 5851. It is therefore apparent that, treating all the provisions of the will as valid, the estate of the trustees will continue, or may continue, 21 years after the expiration of the two lives upon which it is limited, so far at least as there may be minor grandchildren of the testator living at that time.

It will be observed that no part of the principal of the

Digitized by Google

testator's estate is bequeathed to his own children, but the rents, profits, and income are given to them for life, share and share alike. This is equivalent to a devise to them of a life-estate in the property. *Monarque v. Monarque*, 80 N. Y. 324. Upon the death of the testator's son, one-half of the principal of his estate is directed to be paid to his son's children in equal portions; if either of such children die before their father, leaving issue living at the time of his death, such issue to take its parent's share. It appears that it was the intention of the testator that after-born children—that is, children born after the death of the testator—should share in the distribution to be made at the death of their father or mother. The share which each grandchild should take was contingent, not only upon surviving its parent, but also upon the number born and living at the death of such parent. The persons who should take, and the number into which the shares were to be divided, were contingent and uncertain until that time arrived. Until the death of Francis Palms, the testator's son, this half of the estate is vested in the trustees. There is no direct gift to the testator's grandchildren, but simply a direction for a division of one-half of the estate among them after the death of the testator's son.

"Where there is no gift, but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting will not take place until that time arrives." *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 Id. 92; *Shipman v. Rollins*, 98 Id. 311; *Delafield v. Shipman*, 103 Id. 467, 468 (9 N. E. Rep. 184); *Everitt v. Everitt*, 29 Id. 84.

In *Smith v. Edwards*, Finch, J., said that—

"It has been often held that, if futurity is annexed to the substance of the gift, the vesting is suspended."

And that,—

"Where the only gift is the direction to pay or distribute

Digitized by Google

at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift."

The gift to the children of Francis Palms will not vest until the death of Francis. Such was the intention of the testator as gathered from the terms of his will. At that time I think he contemplated and intended a division and distribution should be made among all the children of his son, Francis Palms, then living, and the issue, if any there should be, of any deceased grandchild. The only doubt that can be raised against such intention is the tenth clause of his will, where he directs that "the share" of any grandchild who may be a minor upon the death of his son, Francis, shall remain a part of said trust-estate, and under the management of said trustees, until such child shall be of age. It is inferred by this language, by those who contest the validity of this will, that the testator did not intend that any part of his estate should vest or be segregated from the entire body of the estate until all the minor children living at the time Francis dies shall arrive at the age of 21. I do not regard this as a correct construction of the will. It is only the minor's "share" that is to remain a part of the trust-estate. The whole estate is not directed to remain in the hands of the trustees. Too much weight is placed upon the expression, "shall remain a part of the trust-estate." The implication that, if it remains a part, the whole must also remain to constitute it a part, is not sufficient to overcome the express direction contained in the sixth clause to pay over. The tenth was an attempted modification of the sixth, as to the share of minor grandchildren. If it shall be held to have the effect to modify the sixth clause, so as to postpone the vesting until the minor shall arrive at the age of 21, it would be void as an undue restraint upon alienation. Conceding this to be so, the question then arises whether, that clause being void, the whole will is void.

Digitized by Google

It seems now to be well established that the general intent of a testator may be sustained by cutting off a void trust, which is separable from other valid trusts and dispositions, and not an essential part of the general scheme.

The doctrine was applied in *Woodgate v. Fleet*, 64 N. Y. 573. That case was in many of its aspects quite analogous to the one under consideration. There was a trust-estate to continue during one life, and until a person named should arrive at 21 years, which was equivalent to another life. When that period arrived the trustees were directed to pay to him and the grantor's wife their respective portions of the estate, such proportions to be determined by the number of children of the grantor and his wife who shall be living when the period for distribution arrived; the grantor declaring it to be his express intention that the property should go to and be divided among the said Martha (his widow), John K. (his reputed son), and all lawful children of the grantor who shall be living at the time of distribution, share and share alike. If there were minor children at the time named for distribution, the share of each child should be held in trust for them by the trustees until said children shall arrive at lawful maturity. The trustees were given power to sell and convey the trust-estate, or any part thereof, and apply the proceeds for the benefit of the *cestuis que trustent*. The main distinction between that case and the one at bar, so far as relates to retaining the shares of the minor children in the hands of the trustees until they reached lawful age, is that in that case the trustees had in the meantime no power to receive and apply rents or income, nor was it said that the trustees should continue to hold as before, but simply that the shares should be held in trust, no trust being specified. In this case the trustees are to manage the shares, receive the rents and income, and make such allowance as to them seems proper for the support and education of such grandchild;

Digitized by Google

thus continuing it as an active trust in the hands of the trustees.

Judge Rapallo held in that case that it was a mere passive trust, and that the title vested and passed legally to the beneficiary. But, even if it had been an active trust, he held that the direction to hold the shares during infancy should be considered illegal and void; and, as it was a merely incidental and practically immaterial provision, the failure of it should not defeat the main intent of the grantor. The principal has been acted upon in numerous cases, some of which I cite. *Harrison v. Harrison*, 36 N. Y. 543; *Manice v. Manice*, 43 Id. 384; *Parks v. Parks*, 9 Paige, 107, 117; *Irving v. De Kay*, Id. 521, affirmed in 5 Denio, 647; *Rogers v. Ludlow*, 3 Sanf. Ch. 104; *Haxtun v. Corse*, 2 Barb. Ch. 506; *Savage v. Burnham*, 17 N. Y. 561, 572; *Post v. Hover*, 33 Id. 593; *Wright v. Horne*, 8 Mod. 222; *Cooke v. Stationers' Co.*, 3 Mylne & K. 262; *Carrick v. Errington*, 2 P. Wms. 361; 2 Jarm. Pow. Dev. 32; *Kane v. Gott*, 24 Wend. 665; *Williams v. Williams*, 8 N. Y. 325, 339; *Oxley v. Lane*, 35 Id. 350; *Lang v. Ropke*, 5 Sanf. 363, 371.

No branch of the law calls for a more liberal construction and conservative action on the part of courts than in that which relates to the exposition of last wills and testaments, in order to preserve and carry out, as far as possible, the intention of the testator. Mr. Justice Cowen, in speaking of this subject in *Kane v. Gott*, said:

"The most able and safe judges have said that the court should be astute in allowing it a comprehensive operation for the giving effect to all instruments, and especially to last wills and testaments; and though some parts may be contrary to the rules of law, yet all other parts should be saved. Any court acting systematically upon the opposite principle would be a great evil."

By the sixth clause of the will the testator expressly directs his trustees to pay over, upon the death of his son, one-half of the principal of his estate to his children in equal

Digitized by Google

shares. It plainly appears that his intention was that upon the happening of that event the half of the principal of his estate should fully vest in his grandchildren in equal shares; if any had died leaving issue, such issue to take its parent's share. Such was the general scheme and intention, as expressed in the will. The superadded tenth clause was intended to cover a contingency that might or might not happen, simply as a temporary provision, not affecting the general scheme of the will. He intended that they should take the same share as those who had reached majority at the time of their father's death, and to hold the tenth clause alone void will carry out the main intent of the testator. In holding thus no part of the estate will have to be distributed, as in cases of intestacy, as all the grandchildren will take equally under the sixth clause.

Having reached the conclusion that, if the tenth clause is invalid as unduly restraining alienation, there remain valid trusts which the trustees should execute, perhaps I ought to stop here, for the reason that, whatever might be decided now with reference to the validity or invalidity of the tenth clause, the decision cannot bind children who may be hereafter born who would be affected by it. I wish, however, to record my opinion upon the point raised by counsel that, whenever the will confers upon the trustees a power to sell, the instrument cannot violate the statute against restraints upon alienation of real estate. My impressions are decidedly that this feature does not take trust-estates out of the operation of the statute, for reasons stated in *Brewer v. Brewer*, 11 Hun, 147, and affirmed in 72 N. Y. 603, and cited and applied in *Hobson v. Hale*, 95 Id. 588, 609.

The statutes against perpetuities are directed against provisions in conveyances by will or deed which prevent the vesting of estates *in the beneficiaries;* and, when such vesting is postponed beyond the limits allowed by law, the provision is void as being too remote. It can make no difference

Digitized by Google

whether, during the time which shall elapse before it vests in the beneficiary, the estate vests in trustees, or is by them transferred to others than the beneficiary, and the proceeds and avails are held by the trustees subject to the trust; the policy of the law is defeated unless the contingency happens when the estate shall vest in the beneficiary within the prescribed limits. There would be but little use in statute or common-law restrictions against perpetuities, and the tying up of estates to await the happening of future events, if they can be avoided by merely clothing the trustees with power of sale, but subjecting the proceeds to the trusts declared, and by this simple device such postponement of the vesting of contingent interests be validated.

Thatcher v. St. Andrew's Church, 37 Mich. 264, was a deed of trust. It was made by a married woman for her own benefit, and that of her husband, if he survived her. After their death the fee was given to St. Andrew's Church. The trustees were authorized to hold the property to pay funeral expenses of husband and wife, and other expenses to which they had been put, and fees for their services. There was also a power of sale given to the trustees, and in certain emergencies to mortgage the property. The trustees were not authorized to sell and re-invest, but only in case the rents were not sufficient to carry out the purposes of the trust. In other words, it authorized a sale to close the trust, not to continue it. The case was rightly decided, but I cannot accede to the proposition—

"That the absolute power of alienation is not suspended where the instrument gives the trustees power to dispose of the property at their option. Where power is given to convey the trust-estate, the absolute power of alienation can in no possible way be said to be suspended."

Doubtless the proposition is true as applied to the alienation of any particular property, but it seems that the object and purpose of the law was not kept in view in the opinion.

Digitized by Google

The fact that there is a power of sale of the trust property can have no bearing upon determining the validity of the trust as postponing the ultimate vesting of the trust-estate in the beneficiary. If the trust-estate is tied up longer than the law allows, it is void. The later English cases and text-writers hold the same opinion. *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 573, 582; *In re Edmondson's Estate*, L. R. 5 Eq. 389; *Hobbs v. Parsons*, 2 Smale & G. 212; *Courtier v. Oram*, 21 Beav. 91; *Garland v. Brown*, 10 Law T. (N. S.) 292; Williams, Sett. 32, 33; Jarm. Wills (4th ed.), 281, 282; Theob. Wills (2d ed.), 434; Mars. Perp. 178; 45 Law T. 339.

The statutes of Wisconsin are also similar to those of our own relative to estates in real property, and the supreme court of that state has recently held that the authority in the trustees to sell and re-invest, for the purposes of the trust, where such state of things must continue under the will for a longer period than two lives in being at the creation of the estate, is such a suspension as must be adjudged contrary to the statute, and therefore void. *Ford v. Ford*, 33 N. W. Rep. 188.

It is unnecessary to pursue the half of the principal given to the children of Clotilde, as it is governed by the same rules as those already considered.

One other question remains to be considered. It is urged that the second clause of the codicil is void as being in conflict with the statute, because it suspends the power of alienation more than two lives in being, viz., during the minority of the grandchildren living at the death of the testator, since the two lives in being may die before the minorities expire; and also that it is void because it directs an unauthorized accumulation of the rents.

The last objection it will not be necessary to notice, because, if the position is correct, it is remedied by section 5556, How. Stat.

As to the first objection, a careful reading of this clause

Digitized by Google

discloses that it was not the intention of the testator to continue the accumulation longer than the lives of his son and daughter. Indeed, it is apparent that he contemplated that his son and daughter would outlive the minority of the grandchildren; for he directs that the accumulation shall not continue for a *longer period* than the minority of his grandchildren *then* living, after which the royalties and income were directed to be paid to his children. The intent of the testator appears to have been to suspend the payment of the income to be derived from leases of mineral lands for a period not exceeding the minority of his grandchildren then living, for the purpose of adding such income to the principal of his estate. The income from this new capital was to be paid to his children as provided in his will. Upon the death of his children, this trust must cease. There were two periods at which the trust as to this accumulation should cease; the happening of either would terminate the other. It was not to continue longer than the lives of his two children, and might terminate before their death. The clause, therefore, does not militate against the statute restricting the power of alienation.

The conclusions I have reached are:

1. That the tenth clause of the will unduly restrains the power of alienation, and is void.
2. That the invalid clause does not affect the validity of the remaining trusts in the will; but that the will must be read and its trusts executed the same as if the tenth clause were stricken out.
3. That the second clause of the codicil is valid.
4. That the decree of the circuit court for the county of Wayne, declaring the will invalid, ought to be reversed, and a decree entered here in accordance with the conclusions here reached.
5. That the costs be paid out of the income of the fund in the trustees' hands.

SHERWOOD, C. J., concurred with CHAMPLIN, J.

Digitized by Google

WENDAL A. MACE v. ROLAND D. KENNEDY.

68 389
77 491
68 389
90 123
68 389
101 385
68 389
114 42
68 389
s36NW 187
e132 s648
68 389
141 s183
68 389
f155 s365

Bills and notes—Bona fide holder—Burden of proof—Fraudulent representations—Charge to jury—Bohemian oat contract.

1. Where the maker of a promissory note, in a suit by an alleged innocent holder, sought to avoid payment on the ground that the note was fraudulently obtained, and gave evidence upon his direct examination of the circumstances of the transaction, and was cross-examined upon the facts occurring at the time the note and an accompanying bond were given, he may be further asked to *specifically* point out the *circumstances* or *facts* which constituted the alleged fraud, such inquiry not calling for the *opinion* of the witness upon the *facts*, but for a statement of *what* facts operated upon his mind and produced the fraud complained of.
2. Collateral inquiries into the reputation and business of persons not parties to a suit are not desirable or permissible.

   So *held*, where in a suit upon a note claimed to have been fraudulently obtained the defendant was permitted to show the fraudulent character of *other* notes obtained from *other* parties in the same manner, and their transfer to third parties, and some of them to the plaintiff, *before due*, and the plaintiff was allowed, on the cross-examination of a witness who had testified to such transfer to a particular person, to show that such purchaser was a reputable citizen, and engaged in the business of buying notes generally.
3. Where, in a suit upon a promissory note by an alleged innocent holder, the defendant claimed that the *purchase of that and other* notes of *like* character *was in itself* a badge of fraud and part of a scheme to defraud the community *generally*, the plaintiff may show that there was no talk or thought of fraud abroad in the community at the time the notes were bought, and that the enterprise or scheme seemed only fraught with good results to all who participated in it.
4. To defeat a recovery by the holder of a promissory note purchased before maturity, he must be shown to have had knowledge of such facts and circumstances as would make his taking the paper with the intention of enforcing it an act of bad faith. *N. Y. Iron Mine v. Citizens' Bank*, 44 Mich. 352.
5. After proof that a promissory note, transferred before maturity, was fraudulently obtained of the maker, the burden of proof is

Digitized by Google

upon the transferee to show that he is a *bona fide* holder for value.

6. Where, in a suit by an alleged *bona fide* holder for value of a promissory note transferred before maturity, the defendant relies upon distinct false representations made in obtaining said note, *each* of which is set forth in a request for an instruction to the jury that, if they find that *such* false representation was made, the plaintiff cannot recover unless shown to be a *bona fide* holder for value, it is error to refuse to give such *several* instructions, which is not cured by bunching the three propositions together so that the jury might believe that they must find *all* of the alleged misrepresentations to have been made in order to throw the burden of proof upon the plaintiff on this branch of the case.

Error to Lenawee. (Howell, J.) Argued January 5, 1888. Decided February 2, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Bean & Lane, for appellant.

Watts & Smith, for plaintiff.

MORSE, J. The plaintiff in this suit is the holder of a promissory note for $200, which was obtained in the same manner, for Bohemian oats, as the note in the case of *Sutton v. Beckwith, ante*, 303. A bond similar to the one in that case was executed and delivered to the defendant, the maker of the note, at the time the note was given.

The main question at issue upon the trial was the good faith of the plaintiff, who purchased the note before due, and for value.

The note was executed by defendant December 5, 1884, and delivered to one James Armitage. The note was made payable to R. N. Sims, or bearer, 15 months from date. The bond purported to be given by the Crawford, Henry, and Williams County Bohemian Oat Association, and signed by

Digitized by Google

its superintendent, O. H. Brassington. No time was assigned in which the bond was to be performed, but it provided that the note given by defendant would not be called for until 100 bushels of Bohemian oats were sold by the association for defendant at $10 per bushel.

Armitage sold the note about one month after its date to Frederick Sims for $180 cash. Frederick Sims is a brother of the payee named in the note. Frederick Sims sold it to plaintiff about January 3 or 4, 1886, two months before it fell due, for $192 cash.

The defendant claimed that both Frederick Sims and the plaintiff had notice and knowledge of how this note was obtained, and of the bond executed at the same time.

The defendant testified that he first talked about taking the oats with R. N. Sims, afterwards with R. N. Sims and Armitage together; but he completed the arrangement with Armitage, who drew up the note and filled out the bond. R. N. Sims was to deliver the oats,—20 bushels. The oats were delivered to him. Afterwards he took ten bushels more of the oats, and the bond, which was first drawn agreeing to sell 60 bushels for him, was changed to 100 bushels, by Armitage. At that time defendant gave another note for $100. No one ever offered to sell any oats for him. Armitage represented to him that the association had an office at Napoleon, Ohio, where it was located, and had its headquarters. He represented it to be an incorporated company, and perfectly reliable, having $150,000 deposited in a bank there. Subsequently defendant went to Napoleon, and found the association had no general office there where they did business.

He testified that he was influenced to go into this transaction by the fact that R. N. Sims told him that he had bought the oats the year before, and sold the oats he raised, and did well on them. Defendant also testified that he took the oats, and gave his note, because he supposed the associa-

Digitized by Google

tion would perform its agreement, and sell the 100 bushels of oats for him at $10 per bushel.

Testimony was also given tending to show that no such asssociation was incorporated in Ohio.

The defendant introduced considerable evidence of other transactions similar to his own, where notes were procured from others by Armitage and one Warner, who was connected with him, and similar bonds given back to the makers of the notes, and that all these notes were sold before due, and without reference to the agreement in the bonds, which was never fulfilled. It was shown that several of these notes were so purchased by Fred Sims, and also by the plaintiff, Mace. It was sought to be inferred, from these purchases of Sims and plaintiff, that they knew of the fraud, and participated in it. Testimony was also given in one instance that Fred Sims was in the room when the note and bond were executed. The note in that case was made payable to one Alex McCabe or bearer, but it was delivered to Warner, who passed it over, while in the room, to Fred Sims, who then paid $10 to Warner upon it. The bond was read while Sims was present. There was some other evidence tending to show that Fred Sims and Mace were both acquainted with the business that Armitage and Warner were engaged in, and knew these notes, including the one in suit, were given for Bohemian oats.

Fred Sims was sworn as a witness on the behalf of the plaintiff, and testified that at the time he bought this note made by the defendant, and at the time he sold it to plaintiff, he did not know of any charge of fraud in connection with these notes, in any shape or manner; that he purchased and sold it in perfect good faith. The plaintiff also testified that he bought the note in good faith, paying $192 in cash for it; and that he never saw the bond until the day of the trial of this suit in justice's court, where the case was commenced. He admitted buying five or six of these notes of Fred Sims,

Digitized by Google

and it also appears from his own testimony, clearly enough, that he knew the note in suit was given for Bohemian oats.

The plaintiff had judgment in the court below for the full amount of the note and interest, and the defendant brings error.

There are 18 assignments in relation to the admission or rejection of testimony upon the trial, but several of them were formally waived upon the argument.

Upon the cross-examination of the defendant, and also of one Hawley, who had given a note under similar circumstances as the defendant, these questions were asked respectively: "Now, will you tell me just where the fraud is?" and "Whereabouts was the fraud?" Both of the witnesses were claiming fraud in the obtaining of their notes, and had given evidence upon the direct examination of the circumstances of the transaction. After being cross-examined upon the facts occurring at the time the notes and bonds were made, and the non-performance of the agreement in the bond, they were asked, in effect, by these questions, to specifically point out the circumstances or facts which constituted the fraud claimed. The object of these questions may have been to bring out by their answers the real motive which actuated them in giving the notes, the fact or promise which they relied upon, and which was the inducement to the making of the notes.

The objection to the question is that it called upon the witness to draw a conclusion from the facts. We do not think the question open to this objection. The witness was not asked to give his opinion upon the facts, but to state what facts operated upon his mind and produced the fraud, —in what part of the transaction and by what acts he was misled and defrauded. We cannot see what possible harm could result to the defendant by this inquiry.

Under the theory of the defendant as before stated, that this was a preconcerted swindle, and that several men were

Digitized by Google

engaged in it, who, as soon as possible after procuring the notes, put them into the hands of third persons, and that among these third parties were Fred Sims and the plaintiff, he introduced testimony of one Dennison, who had given a similar note to defendant's, which note was found, before due, in the hands of one Elisha Baker.

The theory of the defendant, upon the trial, as tending to implicate Sims and plaintiff in the fraud, was broad enough to also cast suspicion upon all persons in whose possession the notes were found before due.

Plaintiff's counsel, on cross-examination, inquired of the witness as follows:

"*Q.* Elisha Baker (referring to one to whom the note given by witness had been transferred) is an old citizen there in Morenci, and has lived there a good many years?
"*A.* Yes, sir.
"*Q.* You have known him a good many years?
"*A.* Yes, sir.
"*Q.* Ever since you were a boy?
"*A.* Yes, sir.
"*Q.* He is a very reputable old gentleman, is he not?
"*A.* I have considered him so.
"*Q.* He is a moneyed man, and buys notes?
"*A.* Yes, sir.
"*Q.* And makes that his business?
"*A.* Yes, sir."

To which testimony so given counsel for the defendant objected as incompetent and immaterial, and moved to strike it out. The motion was overruled by the court, and defendant excepted.

The plaintiff's counsel claim that when the defendant was permitted to show the fraudulent character of the notes obtained by Armitage and Warner from others than himself, and the passing of such notes into the hands of third parties, before due, and some of them into the hands of Sims and the plaintiff, for the purpose of establishing bad faith on the part of Sims and plaintiff, the bad faith of other parties who bought such notes was also involved; and that, when a wit-

Digitized by Google

ness for the defendant, under this theory, named a person as the purchaser of his note, the plaintiff had a right, upon cross-examination, to show that such purchaser was a reputable citizen, and engaged in the business of buying notes generally, to rebut such presumption or claim of bad faith.

The trouble with this claim is that such a course of procedure would raise a score or more of collateral inquiries into the reputation and business of persons not parties to the suit, which is not desirable or permissible. The court erred in allowing this cross-examination, and in not striking out the testimony.

The theory of the plaintiff was that at the time these notes were purchased by Sims, the plaintiff, and others, there was no hint or talk of fraud in the community in regard to these notes. This was legitimate to rebut the presumption raised by the defendant that the dealing in these notes was fraudulent, or done with notice of the fraudulent character of the transactions. To support this theory, it was shown that the first year of the operation of this pretended association in Lenawee county the bonds were performed, and everybody connected with the scheme seemed to be making money, and no one was the loser apparently. A banquet and dance was given, at which the promoters and patrons of the swindle joined together in the festivities, and all "went merry as a marriage bell."

But along in January or February, 1886, a suspicion of fraud began to creep though the community, which was soon made a certainty by the non-performance of the bonds.

H. E. Green was one of the persons shown by the defendant to have purchased some of these notes. The plaintiff called him as a witness in rebuttal, and after showing by him that he was a hardware dealer, and sometimes bought notes, asked him if, in the winter of 1885 and the spring and summer of 1886, he bought any Bohemian oat notes. This was objected to as incompetent, irrelevant, and immaterial. The

Digitized by Google

objection was overruled, and the witness permitted to answer. He was also asked if he knew, at the time he bought them, that they were Bohemian oat notes. The same objection was made to this question.

Upon an inquiry from the court, the plaintiff's counsel stated the object of the question as follows:

"What I want to prove by this witness and other witnesses is that during the winter of 1884 and '85, and clear down to March, 1886, there was nothing talked against this business in that community; that it was not agitated in that community at all that there was anything corrupt about this business, or that there was anything illegal about it, or anything fraudulent about it, but that the general speech of people in that community was that it was a legitimate business; and hence when a Bohemian oat note was offered upon the market, there was nothing whatever required of the purchaser, any more than in the purchase of any other note."

The witness, upon this showing, was allowed to proceed, and testified that he had reason to believe part of them were Bohemian oat notes, but did not make any inquiry, as he remembers, and that the first talk that he heard in the community about there being anything wrong in the Bohemian oat business was in February or March, 1886.

The admission of this testimony is assigned as error. We think that, the defendant having first introduced testimony that Green had purchased some of these notes, it was competent for the plaintiff to show the same thing by him; and, considering the respective theories of the defendant and plaintiff as to the purchase of Bohemian oat notes before they were due, the whole of his evidence, as above stated, was admissible.

The defendant could not well claim that the buying of these notes was in itself a badge of fraud, and at the same time deny to the plaintiff the right to show that there was no talk or thought of fraud abroad in the community where these dealings were going on, at the time the notes were bought, and that the enterprise or scheme seemed only

Digitized by Google

fraught with good results to all who participated in it; for, strange as it may seem, not only in this, but in other communities, apparently intelligent and well-disposed men were led to believe for months that the business was not only profitable to all concerned, but entirely honest and legitimate as a business venture.

But we think the circuit judge committed a grievous error in his charge to the jury. It is true that in the first part of his instructions he stated that, if they found that the note was obtained from the defendant by fraud, then, in order to recover, the burden of proof was upon the plaintiff to show by a fair preponderance of evidence that either he or Frederick Sims bought the note in good faith, before due, and paid a valuable consideration therefor, without any knowledge of such facts or circumstances as would put a man of ordinary care and prudence upon inquiry as to whether the note was procured by fraud or not. This was more favorable to the defendant than the law as laid down by this Court would permit, as it has been held that something more than this is needed. The holder must have knowledge of such facts and circumstances as would make his taking the paper with the intention of enforcing it an act of bad faith. *N. Y. Iron Mine v. Citizens' Bank*, 44 Mich. 352 (6 N. W. Rep. 823), and cases there cited.

But later on, in speaking of fraud, he said:

"The charge of fraud and bad faith in the purchase of the note in question, alleged against Mr. Mace and also against Frederick Sims, is a serious and severe charge, and to make it avail it must be proven clearly, like any other fact in the case. If the jury believe from the evidence that Mr. Mace and Frederick Sims, or either of them, purchased this note in good faith, and for a valuable consideration, before it was due, then the plaintiff would be entitled to recover; and to defeat such recovery, by means of the charge of fraud and bad faith made by the defendant against Mr. Mace and Frederick Sims, in the purchase of this note, the alleged fraud must be proved by evidence so convincing, and of such

Digitized by Google

a species, as to leave a very hearty and firm belief of the fact.

"It is not sufficient that the evidence to prove such fraud leaves the mind in perplexity, or generates mere doubt or suspicion of the good faith of Mr. Mace and Frederick Sims. The party charging fraud and bad faith is not entitled to any benefit from such charge unless his proof carries a clear and full impression that the charge is true. Fraud cannot be presumed; it must be proved. When there is nothing on the face of a note to cause suspicion of its character, it can only be impeached or defeated, in the hands of a holder for value, by evidence that he took it under such circumstances as rendered him guilty of bad faith. The proof must show in such a case that the holder for value, who takes the note with no ear-marks of fraud or illegality, has had notice of such fraud or other defense to the note, so that he cannot honestly take the paper without further inquiry. The facts of which he must have knowledge or notice must be such as go to defect of title."

Here, by this portion of the charge, the burden of proof was thrown upon the defendant to establish the fact that neither Sims nor the plaintiff were good-faith holders of the note.

There was certainly evidence in the case tending to show that the inception of the note was fraudulent, and that its consideration was the promise in a bond which was a part of the contract, and a promise which was never meant to be fulfilled. It was sought to be shown by the defendant, by various facts tending in that direction, that both Sims and the plaintiff were parties to the fraud. If parties to the fraud, they could not be good-faith holders of the note. The burden of proof being upon them, after the fraudulent inception of the note was shown, to establish that they were good-faith holders without notice of the fraud, if the minds of the jury were left by the whole evidence in "perplexity," or if "doubt or suspicion were generated" in their minds as to the good faith of Sims and the plaintiff, such perplexity, doubt, and suspicion were sufficient to prevent the recovery of the plaintiff. The jury must find, by a preponderance of the testimony, that one of them purchased the note

Digitized by Google

without knowledge of the fraud. This they could not do if their minds were in a perplexity. If they could not say that they were satisfied of this good faith, and want of knowledge of the fraud,—if their minds were equally balanced upon the subject,—the defendant was entitled to their verdict in his favor.

To instruct the jury that the charge of fraud and bad faith against Sims and the plaintiff in the purchase of the note "must be proved by evidence so convincing, and of such a species, as to leave a very hearty and firm belief of the fraud," put the *onus* upon the defendant, when it should have rested upon the plaintiff.

The defendant was also entitled to his fifth, sixth, and seventh requests, as follows:

"5. If you find that at the time the note in question was procured from defendant it was represented to him that the Crawford, Henry, and Williams County Bohemian Oat Association was a corporation having its principal office and headquarters at Napoleon, in the state of Ohio, and the defendant, relying upon the truth of such representations, gave the note, and would not have given it but for such representations, and such representations were false, then the note was fraudulently procured, and plaintiff cannot recover, unless he shows himself or Fred Sims to be a *bona fide* holder for value.

"6. If you find that at the time the note in question was procured from defendant it was represented to him that the Crawford, Henry, and Williams County Bohemian Oat Association was thoroughly responsible, and had $150,000 deposited as security for the performance of the contracts made by it, and defendant relied upon such representations, and would not have given the note in question but for such representations, and such representations were false, then the note was fraudulently procured, and plaintiff cannot recover here, unless he shows himself or Fred Sims to be a *bona fide* holder for value.

"7. If you find that at the time the note in question was procured it was represented to defendant that the Crawford, Henry, and Williams County Bohemian Oat Association was incorporated, and defendant relied upon such representation, and would not have given such note but for such representa-

Digitized by Google

tion, and the same was false, then the note was fraudulently procured, and the plaintiff cannot recover here, unless he has shown himself or Fred Sims to be a *bona fide* holder of the same for value."

The defendant had the right to rely upon each of these propositions standing alone, so that, if the jury found that any one of the false representations were made, it would place the burden upon plaintiff to show that either he or Fred Sims was a *bona fide* holder for value.

The court evidently intended to give the substance of these requests in his general charge, but he bunched the three propositions together so that the instructions, as given, were open to the charge that the jury might have been led to the belief that they must find all of the misrepresentations to have been made in order to throw the burden of good faith upon the plaintiff.

The court also instructed the jury—

"If the purchaser of the note was informed that a bond had been given by the oat association to the maker of the note, that, of itself, would not charge the purchaser of the note with knowledge of the contents and provisions of the bond, or require him to make inquiry about it."

This instruction was incorrect. The bond and note constituted one contract. See *Sutton v. Backwith, ante*, 310, and cases there cited. If the purchaser of the note was informed that, at the time the note was executed, a bond was given back to the maker, and that such bond was connected with the note, it was his duty to make inquiry and ascertain what the bond contained; in other words, to find out what the contract was that he was buying. He could not shut his eyes to the fact that the note did not, in all probability, contain all the terms and conditions of the agreement between the maker and the payee. It would be the same as if the purchaser of a note before due should be informed that since the execution of the same some agreement or stipulation that

Digitized by Google

might qualify its conditions had been cut off or detached from the same. In such case, the purchaser could not, without further inquiry, become a good-faith holder of the note.

For the errors herein noted the judgment of the court below must be reversed, with costs, and a new trial granted.

CHAMPLIN and LONG, JJ., concurred with MORSE, J.,

SHERWOOD, C. J. I concur in the result.

CAMPBELL, J., did not sit.

---

68 401
70 61
68 401
72 271
68 401
74 577
68 401
104 630
68 401
107 358
108 607
68 401
119 470
68 401
126 643
68 401
s36NW 192
f131 5247
68 401
f158 5297

SARAH J. STUBLY v. DAVID J. BEACHBOARD AND ANDREW J. JOHNSON.

Fraudulent representations—Pleading—Addition of counts separating transactions relied upon—Evidence—Scienter.

1. Where, in a suit to recover money which the plaintiff claims to have been induced to part with and lay out and expend by means of the fraudulent procurement of the defendants, the declaration properly counted upon *three* transactions as *one* deal from its commencement to the final ending, counts added by amendment separating the three transactions do not set forth a new cause of action.

2. The note of a *third* person, which may be needed as evidence in a suit to recover money alleged to have been fraudulently obtained of the plaintiff, need not be surrendered to the *defendants* before bringing such suit.

3. In a suit against *two* defendants to recover money alleged to have been obtained of plaintiff upon a worthless mortgage executed by a *third* party, it is competent for the plaintiff to testify to statements made to him by *one* of the defendants *after* the mortgage was given, indorsing said security, as tending to show his concert of action with his co-defendant, who was *active* in procuring the money.

4. In a suit for the recovery of money loaned to *third* parties on the representations of the defendants that the title to the land was

Digitized by Google

perfect, evidence of its occupancy at the time by claimants of the *original* title is competent to show the falsity of such representations.

5. In actions involving alleged fraud, when the knowledge and intent of the defendant is a material fact, evidence may be received of similar acts which happened shortly before or after, and which had no direct or apparent connection with the principal transaction; and where the question is whether a purchaser of goods procured them through fraud, distinct purchases made by him under similar circumstances, at or about the same time, and when the like motive may be reasonably supposed to have operated, are admissible in evidence with a view to the *quo animo*. *Beebe v. Knapp*, 28 Mich. 65.

Error to Lenawee. (Howell, J.) Argued January 5, 1888. Decided February 2, 1888.

Case. Defendants bring error. Affirmed. The facts are stated in the opinion.

Bean & Lane, for appellants.

Weaver & Weaver, for plaintiff.

LONG, J. The declaration in this cause alleges, substantially, that plaintiff is the wife of one Casper Stubly, and, with her husband, has lived for 25 years and upwards at Rollins, in Lenawee county, during all which time said Casper was and still is acting as agent for plaintiff in loaning money; that said Casper can neither read nor write, and plaintiff but indifferently, and that defendants, who reside at Hudson, in said county, had full knowledge of such facts.

That on the twelfth day of February, 1876, defendants, fraudulently contriving and intending to deceive, cheat, and defraud plaintiff of large sums of money, at Hudson, in said county, and well knowing that plaintiff had money to loan, designedly, falsely, deceitfully, fraudulently, and feloniously pretended to said Casper, agent of plaintiff, that Johnson (one of said defendants) had agreed to loan one Turner some

Digitized by Google

money (one James P. Turner, of Pittsford, Hillsdale county), but that he, said Johnson, had had to furnish some money to his brother, who had got into trouble down east, and so could not spare the money, and desired to have plaintiff make such loan; that Turner would give plaintiff a mortgage upon 40 acres of land in Ionia county to secure said loan; that the title to said land was good; that the land was good and valuable, and was good security for a loan of $460; and that said Beachboard (the other defendant) had once owned it, and had sold it for $1,300.

That said Casper, believing in and relying upon said statements, communicated same to plaintiff, and she, relying thereon, directed Casper to make said loan; that said Casper made said loan of $460 of the money of plaintiff, and took said Turner's note therefor, due in five years from date, with interest at 10 per cent. per annum, secured by mortgage of same amount, made by Turner on said Ionia county land, described as the south-east quarter of the north-west quarter of section 19, township 5 north, range 6 west, Ionia county; that before paying over the money Casper required an abstract of the title to said lands, and placed said moneys in the hands of Beachboard, who was to hold the same till Turner furnished said abstract; that afterwards Beachboard pretended said abstract had been furnished, and he found the title all right.

Plaintiff avers that the title was not all right or perfect; that Turner only had a tax title thereon; that said tax title had passed through several hands, of whom Beachboard was one; that the title was in the heirs of one John Barber; that the land was not good security for the amount of the $460, but, on the contrary, was of little value, not worth over $100; that it was wild, swampy, and uncultivated and untillable, and distant from any road,—all of which facts the defendants then well knew.

That in September, 1877, defendants informed plaintiff

Digitized by Google

that said Turner had sold said land to one David Tubbs, and advised plaintiff that it would be better for her to take a deed from Tubbs of the land than to foreclose her mortgage thereon, and offered to procure said deed for $70, which plaintiff then paid defendants, and obtained said deed.

That afterwards, and on October 27, defendants, further contriving and intending to cheat plaintiff, and defraud her of the said $460 and the said $70, falsely represented to said plaintiff and Casper that one Joseph Bathrick desired to loan a sum of money of plaintiff, and to purchase said Ionia land, and as security for said loan and land would give a mortgage on an 80-acre farm owned by him near Flint, in this State; that said land was a good, valuable, and improved farm worth $4,000, had good buildings, was well stocked, the title thereto perfect and all right, and that he wanted the money to build a large barn on said farm; that he wanted the interest payable on the first day of January in each year, to give him time to turn off his fat cattle, hogs, and produce; that it was in an old improved country and neighborhood, and was ample security. And, being informed by plaintiff that she had no ready money to loan, defendants then said they would take three small mortgages which plaintiff had, and cash them. Defendant Beachboard then took from his pocket and read to said Casper what he (defendant) said was an abstract of title to said Bathrick's farm, near Flint. Said defendant Beachboard then caused to be drawn a deed from plaintiff to said Bathrick of the Ionia land, and assignments of the three small mortgages,—one to said Beachboard, for $173.99, one to said Johnson, for $170.67, and one to one George R. Beardsell, a former partner of said Beachboard, of $100 and interest,—all of which plaintiff then and there executed and delivered to said defendants, and in exchange therefor received from said Bathrick a mortgage of $1,155.55, due in five years from date, with interest at ten per cent., payable on January 1, annually, on what plaintiff then

Digitized by Google

believed was said farm near Flint, and also the note of said Bathrick for the same amount accompanying said mortgage.

Plaintiff avers that, in fact, said land mortgaged was not 80 acres of land near Flint, but said land was situated in Lake county, Michigan, nearly 200 miles from Flint, and described as the north half of the north-west quarter of section 20, township 17 north, range 12 west, Lake county; that said land was not worth $4,000; that it was not worth over $200; that it was not good land, but is what is called "jack pine" land; that it was not an improved farm, but only had about 12 acres cleared, and that only indifferently; that it had no buildings except a dilapidated log house and barn of no value, and was not stocked at all; nor did said Bathrick and wife live on said farm, nor did they live near Flint, but did live at Pittsford, about six miles west of Hudson; nor did said Beachboard have an abstract of said land, —all which matters defendants then and there well knew.

Plaintiff further says that, no interest being paid on said mortgage, she caused the same to be foreclosed, and then for the first time discovered the real location of said land, but not till long after the foreclosure did she discover its real condition and value; that said land was sold on said foreclosure on June 6, 1879, for unpaid interest and costs of foreclosure, amounting in all to the sum of $199.33, subject to the payment of the principal sum of $1,155.55, and was bid in by plaintiff, and in default of redemption said mortgage title has become absolute in plaintiff; and the plaintiff says that said land is of no value, and she has entirely lost and been defrauded of said several sums of money, the three small mortgages, and her costs and expenses aforesaid. And plaintiff says that after the discovery of the fraud so practiced upon her, and before the commencement of this suit, she executed and acknowledged, and caused to be tendered to said defendants, a deed to said Lake county lands, in trust for said Joseph Bathrick, mortgagor, and at the same time

Digitized by Google

caused to be demanded of said defendants the said several sums of money so paid over to them; and that said defendants refused to accept said deed, or repay plaintiff any sum of money whatever, etc.

In the second count of her declaration the plaintiff alleges that on the third day of March, 1876, at Hudson, aforesaid, the said defendants, well knowing that plaintiff had money to loan, and that her husband, said Casper, was acting for her in the loaning thereof, and that said Casper could neither read nor write, and that plaintiff could only do so in a very indifferent manner, and that Casper and plaintiff confided in the honesty and truthfulness of them, the said defendants, and each of them, then and there, with intent to cheat and defraud the plaintiff of large sums of money, designedly, deceitfully, falsely, and fraudulently pretended and represented to said Casper that the said Johnson had promised to loan some money to a Dutchman living on his farm in the township of Wright, Hillsdale county, Michigan, but that his, said Johnson's, brother had got into some trouble down east, and he had had to help him, and so could not loan the money to the Dutchman, but wanted to loan the money of the plaintiff for the Dutchman, and thereupon introduced to said Casper the said Dutchman, one Frederick Ditmer, and the said Ditmer then and there, in presence of said defendants, and at their instigation, then stated that he wanted a loan of $860, and would give as security a mortgage on his 80-acre farm situate in South Wright, Hillsdale county, Michigan; that said farm was a good improved farm, clear from all incumbrances, and that the title was good, and that it was good security for said loan.

That Casper then stated he would make the loan, if the title was all right, when said Beachboard took from said Ditmer a paper, and then and there, in presence of said Johnson, read over what he said was an abstract, and which sounded to Casper like an abstract, and stated that the

Digitized by Google

abstract was all right, and the title all right, and that it was a good improved farm in South Wright; and the said Beachboard thereupon caused a mortgage to be drawn and executed by said Ditmer upon what Casper believed, and what said defendants then said, was said South Wright 80-acre farm, running to plaintiff for the sum, as Casper then supposed, of $860, due in five years, with interest payable semi-annually at 10 per cent.; whereupon said Casper, acting for plaintiff, handed to said Beachboard the sum of $860, and said Beachboard then stated he would take said mortgage, and send it to Hillsdale for record.

And the plaintiff says that, in fact, the land upon which said mortgage was given was not located in South Wright, nor in Hillsdale county, but, on the contrary, was located in Saginaw county, Michigan, and described as the west half of the south-west quarter of section 2, township 9 north, range 4 east; nor was said mortgage given for $860, but was for the amount of $825, with interest payable annually; nor did said Ditmer live on said land; nor was said land a good improved farm, but was wild land of little value; nor was said land good security for $860, or any other sum whatever; nor was the title thereto good or perfect, nor had said Ditmer any title thereto, except a tax title, which was disputed by parties, whose assigns have since gone into possession; nor did said Beachboard have an abstract therefor,—all which matters and things the said defendants then and there well knew, and fraudulently concealed from plaintiff and said Casper.

That on the twenty-sixth day of September, 1876, the defendants, still contriving and intending to cheat and defraud the plaintiff of said $860, and the interest thereon, then and there pretended that said Ditmer and one John Wean had traded farms, and that said Wean wanted plaintiff to discharge her said Ditmer mortgage on said South Wright farm; that said Wean wanted some more money, and would give a mortgage for the whole sum on lands in Saginaw

Digitized by Google

and Montcalm counties, a part on one and a part on the other; that said Saginaw county lands consisted of 80 acres, and was splendid timbered lands, and that the title was good and perfect; that said Montcalm county land was an 80-acre farm, an old improved farm, worth $3,000, with good buildings, and that the title thereto was good and perfect.

That said defendant Beachboard then and there read what he pretended was an abstract of each piece of land; that said defendant Beachboard then drew up, and said John B. Wean and wife executed, two mortgages, one of $600 upon said Saginaw county land, due in three years, with interest at 10 per cent. per annum, and the other for $939.53 upon what plaintiff then supposed was the Montcalm county land, as described by said defendants and said Wean; that thereupon plaintiff made and executed and delivered to defendants a discharge of said Ditmer mortgage, plaintiff still believing that said Ditmer mortgage had covered the lands in South Wright, Hillsdale county, as represented by defendants; and plaintiff also gave to defendants a sum of money, which, with the $860 and interest, amounted to the sum of $1,539.53.

And the plaintiff says that the Saginaw county land, upon which the $600 Wean mortgage was given, was and is in fact the same land upon which the Ditmer mortgage was given for the $825, and is described as the west half of the south-west quarter of section 2, in township 9 north, range 4 east, Saginaw county; that said Wean had no title thereto except a tax title; that the holders of the original title claimed to hold the same, and had gone into possession; that the land was not well timbered, and was not valuable, being of very little value, and not good security for $600, nor for any other sum; that the land upon which the other Wean mortgage was given, being for the sum of $939.53, was not located in Montcalm county, but was the north half of the south-east quarter of section 8, township 11 north, range 16 west, Muskegon county, this State; that it was not an old improved

Digitized by Google

farm, worth $3,000, but was very poor land,—what is called "buckwheat" land,—in a deserted section of the country, no one living upon it, no buildings except a small uninhabitable house, fences and timber burned off and destroyed, only a few acres ever having been cultivated, and the taxes unpaid, and the land returned and sold for taxes,—all which facts the defendants then and there well knew.

Plaintiff further says that, no interest being paid on either of said mortgages, she caused said mortgages to be foreclosed, and upon said sale purchased in said Saginaw county land for the sum of $897.60, on January 10, 1879, and said Muskegon county land for the sum of $1,276.21, on January 11, 1879, that being the amount due upon each of said mortgages, with costs of said foreclosure; and that the title to each of said pieces of land has now become absolute in the plaintiff.

And the plaintiff says that said land, and each parcel thereof, are of no value, and that she has lost and been defrauded of the said several sums of money, and the interest thereon, and her costs and expenses aforesaid; that upon the discovery of the frauds so practiced upon her, and before the commencement of this suit, she executed and acknowledged, and caused to be tendered to said defendants, a deed of said Saginaw and Muskegon county lands, in trust for said John B. Wean and wife, the mortgagors, and at the same time caused to be demanded of the defendants the said several sums of money so paid over to defendants; that defendants refused to accept said deed, and refused to pay said several sums of money, or any sum whatever, etc.

This declaration was filed in the cause on the third day of November, 1882.

On September 15, 1885, plaintiff, by leave of the court, filed amendments to her declaration, by adding five new counts thereto.

The first *added* count sets out the Turner transaction, sub-

Digitized by Google

stantially as set out in the first count, and claims a recovery of the moneys, by reason of the fraud, that plaintiff advanced upon the Turner note and mortgage.

The second *added* count sets out the Turner transaction, and the procuring of the Tubbs deed of the Ionia land, the payment by plaintiff to defendants of the $70 in procuring the Tubbs deed, substantially as set out in first count of declaration, and claims a recovery of the money, by reason of the fraud, that plaintiff advanced upon the Turner note and mortgage, and the $70 advanced in procuring the Tubbs deed.

The third *added* count sets out the Bathrick transaction, substantially as set out in the first count of the declaration, and claims a recovery by reason of the fraud for the value of the three small mortgages, and the value of the Ionia county land.

The fourth *added* count sets out the entire Ditmer transaction up to the taking of the Ditmer mortgage, substantially as set out in the second count of the declaration, and claims a recovery of the moneys, by reason of the fraud, advanced upon the Ditmer mortgage.

The fifth *added* count sets out the entire Wean transaction, the discharge of the Ditmer mortgage, and the giving of the two Wean mortgages and foreclosure of the same, the tender of the deed to the defendants for use of Wean and wife, substantially as set out in the second count of the declaration, and claims a recovery of the moneys, by reason of the fraud, advanced by plaintiff on the Ditmer and Wean mortgages.

After these counts were added to the declaration, the defendants' counsel, before the trial came on, asked an order striking these amendments to the declaration from the files for the reasons:

"1. That the causes of action set out and alleged in said last five counts, and each of them, did not accrue within six years next preceding this date.

Digitized by Google

"2. That each of said counts, if it sets out a cause of action at all, sets out a cause of action which did not accrue within six years next preceding the allowing of said amendments, nor within six years next prior to the entry of the special motion asking for such amendments.

"3. That each of the causes of action set out in said counts, so added by amendment, are new and different causes of action from those set out in the declaration before said counts were added.

"4. For the reason that no recovery could be had upon the declaration before said amendments were allowed, nor could any evidence be introduced thereunder, because each of the counts therein contained embraced in its allegations more than one distinct and several cause of action."

The court overruled this motion.

The defendants pleaded the general issue, and gave notice under their plea that—

"They will give in evidence and insist in their defense that no one of the causes of action set forth and alleged in the five counts of the plaintiff's declaration above referred to accrued within six years prior to and next preceding the allowing of said amendments this day, and, if they ever existed, are barred by the statute of limitations."

The cause came on for trial, and plaintiff recovered verdict and judgment for $1,479.50. The defendants bring error.

The first four assignments of error relate to the exceptions taken by the defendants upon the refusal of the court to grant the motion to strike from the files the five counts added as amendments to the declaration, and the refusal of the court to strike out any and all evidence taken under said added counts.

It was insisted upon the trial, and is insisted upon here, that the two counts in the declaration, as it stood before the addition of the last five, are framed in disaffirmance of the several transactions which furnish their subject-matter; that they each allege a fraudulent procurement of the several sums of money invested by plaintiff in each, a tender back of

Digitized by Google

what had been received, and a claim for money and property advanced upon the faith of the fraudulent representations; and that the first of the five counts added by amendment is one which counts upon the Turner transaction by way of affirmance of the transaction, and asks for damages suffered by reason of the fraud alleged; and that the plaintiff should not have been permitted to add this third count by amendment, for the reason that the cause of action therein was a new and distinct cause of action from any counted upon in the declaration before such amendment, and that the cause of action stated in said added count is one barred by the statute of limitations. The same complaint is made as to the second of the five added counts.

The objection to the fourth added count is that it stands in the same relation to the second count of the original declaration as the first and second added counts do to the first count of the original declaration, and that the fifth added count stands in the same relation to the second count of the original declaration as the fourth added count does to the said second count.

We need not discuss the third added count, as the court took all questions arising under that from the jury.

We do not view the declaration in the light claimed by defendants' counsel. The first count of the original declaration counted upon the Turner, Tubbs, and Bathrick transactions as one transaction; that is, that the Tubbs transaction grew out of the Turner matter, and that the Bathrick matter was the final issue of that, and grew out of both the Turner and Tubbs transactions; that it was one deal from its commencement to the final ending, in putting upon plaintiff the Bathrick note and mortgage; and the claim for damages in that count is stated substantially as follows:

"That she has been put to other and further trouble and expense in and about trying to collect the interest on the said mortgage [the Bathrick mortgage] and the Turner mortgage,

Digitized by Google

and in and about trying to ascertain the location and condition and value of said Ionia and Lake county lands; * * * that the said land is of no value to her, and she has entirely lost and been defrauded of the said several sums of money, and the three small mortgages, and her costs and expenses aforesaid."

That is, that, by reason of the fraud practiced upon her, she has been defrauded of the moneys entering into the Bathrick mortgage, the value of the three small mortgages, and the costs and expenses she has been put to in ascertaining the value, location, and condition of the Ionia county land. The first, second, and third added counts separated these transactions, counting upon the Turner, Tubbs, and Bathrick transactions each separately, and claiming a recovery for the value in each transaction of what plaintiff has been defrauded. The basis of plaintiff's recovery would, either under the original first count or under the first three added counts, have been the amount of money and interest upon it that plaintiff had been induced to part with, and to lay out and expend, by the fraudulent procurement of the defendants.

These added counts did not set out any new cause of action. They simply separated into three parts what had appeared as one entire transaction in the first count. If it became necessary for plaintiff's recovery to add these amendments, they were properly added.

We do not see, however, any necessity for the amendments. If the plaintiff had a right of recovery, we think her action could be maintained under the first count of the original declaration upon all three transactions. We also think the second count of the original declaration was sufficiently explicit to allow a recovery for the Ditmer and Wean transactions. If either party had a right to complain of the rulings of the court upon the pleadings, surely it was not the defendants.

Digitized by Google

At the close of the trial the court instructed the jury as follows:

"She has set forth her claim against the defendants in seven separate counts in her declaration. I think she cannot have any recovery under the first, second, and fifth counts. I think she can recover nothing on account of the loan to Bathrick, and for the three small mortgages assigned to Johnson, Beachboard, and Beardsell, for the reason that when she tendered back the deed of the Lake county land, after the foreclosure of the Bathrick mortgage, she did not tender back the Bathrick note given with the mortgage. Hence the Bathrick loan and mortgage, and the three small mortgages above mentioned, will be dismissed from your further consideration in this case."

As we have before remarked, the first and second counts of the declaration were sufficiently specific to allow a recovery for all the moneys the plaintiff lost by the fraudulent practices of the defendants in all the transactions. The defendants had no right to complain of the ruling of the court upon this part of the case. If the jury believed the testimony of the plaintiff, and her husband, Casper, and the other witnesses offered by her, corroborated by the documentary evidence introduced, they could not but believe that a most outrageous fraud had been practiced upon the plaintiff by the defendants and the parties whom they had brought to their aid in these several transactions, and the whole matter should have been submitted for their consideration.

The fact that the Bathrick note was not tendered to defendants at the time the deed was tendered was not a matter of which defendants could complain, and it might become a matter of important evidence for the plaintiff on the trial. *Dayton v. Monroe*, 47 Mich. 194 (10 N. W. Rep. 196). If the plaintiff's theory is correct,—and evidence was offered tending to prove it,—a wicked and deliberate conspiracy was inaugurated, and cunningly carried out, in all its details, to defraud the plaintiff of large sums of money, and the

Digitized by Google

whole matter should have gone to the jury for their consideration.

The fifth assignment of error relates to the overruling of defendants' motion to strike out the statement of Casper, plaintiff's husband and agent. Casper stated:

"After making the Wean mortgages at the bank, I went up to the corners by Boies' store, and met Johnson. He says, 'You have got them all?' Says I, 'Yes.' Says he, 'Don't you want to sell it?' I told him, 'No.' 'Well,' says he, 'It is a good thing.'"

Witness then stated:

"I had not had any talk with him before about the Wean mortgage."

We think the testimony was properly admitted. It had a tendency to show Johnson's connection with and knowledge of the Wean transaction, and his concert of action with the defendant Beachboard, who was actively engaged in procuring the money from plaintiff upon the mortgage.

There was no error in refusing to strike out the testimony of Casper regarding what Beachboard said to him about the taxes on the Muskegon land, and about going to look at the land, and a man being found dead, which is the basis of the sixth assignment of error. This evidence was proper, as bearing upon the defendants' knowledge of the worthlessness of the land, and tended to show that the statements they made about the land they knew to be false, and that they wanted to deter Casper from finding out the falsity of such statements.

The seventh to twelfth assignments of error relate to objections made to the testimony regarding the Saginaw land. This evidence was competent, and referred to the occupancy of the land by persons claiming the original title. This was not competent for the purpose of showing that the holders of the original title had a better title than Ditmer and Wean, but to show the falsity of the representations made by defend-

Digitized by Google

ants, and that the title of Ditmer and Wean was not a good and perfect title, but that there was at that time persons in actual possession, and that Ditmer or Wean had never been in possession. The moneys were loaned as an investment, and defendants knew plaintiff would not loan money upon land to which the title or possession was in dispute.

The fifteenth and sixteenth assignments of error relate to the following questions put to Casper:

"If you had known, Mr. Stubly, that the Ionia land was nothing but a tax title, and that that was the only title Turner had for it, would you have made the loan of $460?"

And again:

"If you had known people were living on part of it [the Saginaw land], claiming to own it at that time, would you have put any more money on it?"

This evidence was properly admitted.

The plaintiff's claim, and the case made by the proofs, was that the defendants' representations in regard to the securities were, among other things, that the titles to the lands on which it was proposed to make the loans were good and perfect, and that was one of the assurances that the money would be safe, and the evidence bore on their reliance upon defendants' statements, and tended directly to prove their falsity, for a title which was liable to dispute did not fulfill their statement that it was a good and perfect title; and especially was this true when defendants claimed to have an abstract showing the title as good and perfect, they having full knowledge that Casper, acting for plaintiff, was unable to read and write.

The eighteenth, nineteenth, twenty-first, and twenty-second assignments of error relate to the objection to the proof of the titles to the Saginaw and Ionia lands. We think this evidence was properly admitted; and there was no error in receiving in evidence the two deeds tendered to defendants.

The other assignments of error relate to the refusal of the

Digitized by Google

court to give in charge to the jury certain requests of the defendants. We find no error in this. The charge of the court to the jury was very full and explicit upon all the questions raised, and, as we have before remarked, if either of the parties had a right to complain of this charge, it was the plaintiff.

The thirteenth and fourteenth assignments of error raise the principal point in the case, and is one of the points most strenuously urged by defendants' counsel for the reversal of the judgment. These assignments of error relate to the admission of the evidence, under defendants' objection, of one Andrew McCarl, who testified, in substance that—

"In August, 1877, he went to Beachboard, in the village of Hudson, and asked him if he was a real estate agent, and he said he was, and he told him that he desired to sell or exchange his house and lot in the village of Hudson for land in the state of Illinois; that it run along with different talks until November; that Beachboard came to him, and represented to him that one Mrs. Updyke had 160 acres of land in Missouri, which he represented as being a very nice 160 acres of land,—as nice a 160 acres as lays out doors,—good farming land, in a good country, timbered with white oak, whitewood, and black walnut, and only 90 miles from St. Louis, Missouri, for which he asked $1,800; that he and Mr. Beachboard talked the matter over, and he told Mr. Beachboard that if he traded he would trade even or he would not trade at all; that they went to Beachboard's house, and that Beachboard got a plat, and showed him by that about the land,—showed him where the plowed land was and where the timber was; that the timber was very nice, a kind of oak, whitewood, and black walnut; that witness told him that he did not want so much land, and did not want to go so far off; that Beachboard said only 90 miles from St. Louis; that Beachboard told him that he had seen parties who had been there, and that it was as nice a 160 acres of land as lays out of doors; that he, witness, said if you will tell me who these parties are, I will go and see them, and talk with them about the land; that Beachboard said he need not do that, for he had seen them, and he was doing this work for him, and would not cheat witness out of a dollar; that witness said he would trade even if he traded at all.

Digitized by Google

"That Beachboard said to him that he should go and see Updyke, and told witness he might see Mr. Johnson, the defendant; that witness went to see Mr. Johnson, and saw him by the post-office, and Mr. Johnson recommended it (the land) as a good piece of land; that witness said to Johnson, 'Well, Mr. Johnson, if it is not a good piece of land, I don't want it at all;' that he (Johnson) had seen a letter telling about it; that it was good land; that it was a nice 160 acres.

"That Updyke came to witness' house to look at it, and looked the house over, and Updyke said that it was a very nice little house, and then witness and Updyke talked about the trade, and witness said that he would trade even or not at all, and Updyke took him up and said they would trade; that they went over to town; that Johnson went with Updyke to his (witness') house at that time; that when they were there Johnson, in reply to a question of witness' wife, said that it was a good farm,—a good straight farm; that Updyke said it was a good 160 acres of land; that Mr. Johnson said but very little; that they went back over town, and met Beachboard, who asked witness how he had traded, and witness replied that they had traded even. They went up to Hiller's office, Mr. Beachboard and himself and Mr. Updyke, and (Mr. Johnson not going up) Beachboard said to Johnson, 'Better come up,' but he said, 'No.' Beachboard had Mr. Sawyer draw up a deed of the house and lot. Mr. Beachboard, in reply to a request of the witness, said that witness could have an abstract.

"That the deeds were drawn and signed, and witness paid Beachboard $1.10 in silver to get it recorded; that he did not get an abstract; that he afterwards learned, when it came back, that the deed on the Missouri land was for only 80 acres, instead of 160 acres, of land; that before the deed got back he heard that the land was not good for anything; that, after learning this, witness had no talk with either Beachboard or Johnson, but went to see Mr. Keith; that he afterwards took steps to get his land back, the deed being made in November, and he got it back in July following; that he employed Mr. Salsbury to get it back for him."

Being cross-examined by counsel for the defendants, the said McCarl gave evidence tending to prove that,—

"At the time the land was deeded to him, Beachboard told Sawyer that it was 160 acres; that he (witness) told Mr.

Digitized by Google

Beachboard that he would give him $25 if he sold his place for cash, and $5 if he disposed of his property for him by trade; that after the transaction was all completed, and settled up, and he had got his house and lot back, he paid Beachboard the $5 as he had agreed to, understanding that he owed Beachboard the $5 for doing what he did; that Mr. Beachboard did not claim to have seen the land, but said he had seen parties that had seen the land, and had a letter commending it (the 160 acres of land), which he read to him; that he did not make any other representations than those contained in the letter which he read, and what parties had told him about its being a good 160 acres of land. That since this transaction witness has always trusted Mr. Beachboard, and Beachboard had done his business for him, and witness had worked for him upon his land. This was in answer to a question, and was answered by 'Yes.'"

These assignments also relate to the ruling of the court in admitting the testimony of one William Keith, who gave testimony tending to show that he knew Mrs. Updyke, who at one time owned a piece of land in Missouri, which witness some 16 or 17 years before went to see; that he could not remember the exact distance the land was from the railroad, but thinks it was some 40 miles, but since then the railroad has gone up so it is within some 20 to 25 miles of it; that he went through a wild country to get to it; that he found it through a man whom he hired to go with him, who was well acquainted with the country, and knew all about the land.

"Found it in a wild state; was not settled. The surface was rough, mountainous, and rocky, covered with stones, timbered with small oak, and I have understood there was some basswood and sycamore. The bottom lands were rough, and there was no timber. This was half a section of land. I do not think the land was worth anything at all."

That when he came home he reported to Mr. Updyke; that they went on horseback something over 20 miles; that there were no roads, nothing but trails.

"It was very mountainous and rocky, and we probably had to travel a good deal more than 20 miles to get there. Some

Digitized by Google

streams hindered us. Found the land in that wild state. No settlers there, only two log huts on the way, one within a half mile of the land. The land was not tillable."

Counsel for the defendants objected to the last statement as immaterial and incompetent, and moved to strike it out, which motion was then and there overruled by the court, to which ruling the defendants excepted.

Witness further gave evidence tending to show that he knew McCarl, a colored man living in Hudson, now here in court, and of his coming to see him about the land six or eight years ago; that Mr. Beachboard asked him once in Hudson about the land, where it was, saying that he talked of going to that country, and did not know but he could look after it, or something like that; that it was before the talk with McCarl that he talked with Beachboard.

Upon cross-examination by counsel for the defendants, witness further gave evidence as follows: That all he knew about this being the indentical land described in the deed of Mrs. Updyke was what he was told,—what the sheriff told him, and what he got from the records; that he could not tell from the records whether that was the land or not; that he could not tell whether he got at the section corner; that he could not tell whether it was the north-east or south-east corner of section one, two, or three, of his own knowledge; that the only way he could tell which section he was on was by the paper; that there were numbers on the sections; that a man who lived about a half a mile from there told him that his land was on the corner of the last section; that he judged that this land was in some other section; that there were numbers on the corners; that this was the number on the section and the section corner, "but I could not tell whether it was the east half or the west half."

He was asked the following questions by counsel for the defendants:

"Do you testify that you know of your own knowledge

Digitized by Google

that you were on the land described in Mrs. Updyke's deed? Do you know that of your own knowledge, or do you judge from what was told you, what the other man told you, that it was?"

Witness replied:

"No; I do not know anything about it, whether I was on the land described in Mrs. Updyke's deed or not."

He further said that he judged from what he found out from the register of deeds, and from the plat he had comparing with the deed he had; that the plat was marked in sections and townships,—no other marks upon the plat except sections and township marks; that there were marks of section corners on the plat.

"We had the plat of the land with us, and there were numbers on the corner stakes. I satisfied myself we were on the land we were looking for. Cannot now remember the number of the section it was."

Witness was further asked by counsel for the defendants the following question:

"Then, as I understand, you do not know, of your own knowledge, as to whether you were on that land or not, except what you gleaned from the sheriff and the other man; is that true?"

To which witness replied:

"As I said before, that is all I know about it,—all I had to go by."

The foregoing is a substantial statement of all the testimony of said witness in regard to the identity of the land he saw as the land described in the Updyke deed.

Defendants' counsel claim that this case comes within the ruling in the case of *Parker v. Armstrong*, 55 Mich. 176 (20 N. W. Rep. 892), and that the testimony of these witnesses was incompetent, and ought to have been excluded. There is no warrant for such an assumption. The case of *Parker*

Digitized by Google

v. Armstrong was a very different case, and this Court said in that case:

"As the notes were genuine and good against Crapser, it is not plain what room there was for the doctrine of proof of *scienter* by such dealings."

In this case the claim made by the declaration was that during the years 1876, '77, '78, and '79 these defendants were engaged in a series of transactions, one following closely upon the other, putting off upon the plaintiff certain mortgages upon lands which were utterly worthless, and known to be so by the defendants, and thus fraudulently obtaining from the plaintiff large sums of money. The proofs introduced tended strongly to show the truth of the matters alleged. Though not charged in the declaration as a conspiracy, the point of fact that it was a conspiracy might be proved, and, as we have before said, if the testimony of plaintiff and her witnesses was to be believed, the defendants did conspire with these other persons to defraud her; and while they were carrying on these very transactions the McCarl case arises, similar in all respects as the transactions with the plaintiff. We think the testimony of McCarl and Keith was competent as proof of *scienter*, under the ruling of this Court in *Beebe v. Knapp*, 28 Mich. 53. In that case this Court said:

"It is conceded by counsel for the plaintiff in error that in actions involving alleged fraud, when the knowledge and intent of the defendant is a material fact, evidence may be received of similar acts which happened shortly before or after, and which had no direct or apparent connection with the principal transaction; and where the question is whether a purchaser of goods procured them through fraud, distinct purchases made by him under similar circumstances, at or about the same time, and when the like motive may be reasonably supposed to have operated, are admissible in evidence with a view to the *quo animo*."

These defendants had made Turner, Tubbs, and Bathrick their tools in carrying out the Bathrick transactions, and had

Digitized by Google

used Ditmer and Wean in the other. The question before the jury was, were these things true which plaintiff claimed; had the defendants knowledge of the fact that all these lands were worthless, and the mortgages and notes no better than blank paper upon which they were written? We think the McCarl case was competent to show them engaged in a similar transaction with other parties about that time for the purpose of showing their fraudulent intent. This doctrine is fully sustained in the following cases: *Pomeroy v. Bailey*, 43 N. H. 125; *Hall v. Naylor*, 18 N. Y. 588; *Olmsted v. Hotailing*, 1 Hill, 317; *Castle v. Bullard*, 23 How. 172; *Lincoln v. Claflin*, 7 Wall. 132.

In *Eastman v. Premo*, 49 Vt. 355, the court said:

"The plaintiff, on the trial, offered testimony to show that the defendant was engaged in other transactions in horses contemporaneous with this, which were fraudulent, for the purpose of sustaining the plaintiff's claim that the defendant purchased the plaintiff's horse with fraudulent intent of getting possession thereof, and not paying for him."

This evidence was received, and the court held it competent "for the purpose of showing the defendant's intent."

We find no error in the record, and the judgment is affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

68 424
139 464
68 424
146 52

D. LANSING SKINNER, RECEIVER, ETC., v. THOMAS J. LUCAS AND WILLIAM B. BENNETT, IMPLEADED WITH WILLIAM D. MANSFIELD.

Receiver—Legality of appointment—Collateral inquiry—Security for costs—Approval of bond.

1. The legality of the appointment of a receiver cannot be questioned in a *collateral* proceeding by defendants who have *fully* and *completely* recognized such officer as legally appointed.

   So *held*, in a suit by the receiver of a fire insurance company brought to recover costs adjudged in his favor on the hearing of a petition by the secretary of the company for the payment of an alleged indebtedness due him, and in which matter he entered into an undertaking for the payment of the costs sued for, it appearing that the act under which the company was organized was invalid on account of a defective title.

2. Chancery rule No. 6, providing for security for costs by non-residents, does not prescribe any particular form in which the security shall be given, which question could only become material upon application for judgment against the sureties at time of rendition of judgment against the principal. *Brion v. Kennedy*, 47 Mich. 499.

3. The approval of a bond or undertaking given as security for costs is not a condition precedent to the liability of the principal thereon.

4. In a suit on an undertaking given as security for costs, and actually filed with the proper officer, he cannot be asked if he received the obligation as a compliance with the order of the court requiring its execution, such inquiry being immaterial, and his views upon that question not affecting the plaintiff's right of recovery.

Error to Kent. (Montgomery, J.) Argued January 17, 1888. Decided February 2, 1888.

Assumpsit. Defendants Lucas and Bennett bring error. Affirmed. The facts are stated in the opinion.

William E. Grove, for appellants.

Digitized by Google

Mark Norris, for plaintiff.

LONG, J. The plaintiff brought this suit in the character of receiver of the Michigan Mutual Fire Insurance Company, averring in the declaration that he had been duly appointed as such receiver.

The action is based upon an alleged bond or undertaking for costs.

The averments of the declaration are, substantially, that on the thirteenth day of April, 1885, defendant Mansfield exhibited his petition to the circuit court for the county of Kent, in chancery, in a certain cause therein pending, wherein Eugene Pringle, as Commissioner of Insurance for the State of Michigan, was complainant, and the said Michigan Mutual Fire Insurance Company was defendant, praying thereby that plaintiff be ordered to show cause why the claims of said defendant Mansfield set forth in said petition should not be paid out of the funds in plaintiff's hands as receiver of said Michigan Mutual Fire Insurance Company; that plaintiff answered said petition, and the matter was referred to a special master to take proofs, and state the account between said Mansfield and plaintiff as such receiver, and report the same, with his finding and conclusions of fact and law, to said court; that, in the matter of said petition, said defendant Mansfield was required by order of said court, in chancery, to furnish security for all costs which might be taxed against him in the matter of said petition.

That, pursuant to said order, the defendant executed and delivered to the register of said court, in chancery, for the use and benefit of the plaintiff, a writing obligatory conditioned as follows:

"We, William D. Mansfield as principal, and Thomas J. Lucas and William B. Bennett as sureties, undertake and agree to pay to the said D. Lansing Skinner, receiver aforesaid, any and all costs incurred by reason of such reference, if the costs of such reference be adjudged against

Digitized by Google

the said William D. Mansfield; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators; then and in that event this undertaking shall be null and void; otherwise, to remain in full force and virtue.

"W. D. MANSFIELD. [Seal.]
"THOMAS J. LUCAS. [Seal.]
"W. B. BENNETT. [Seal.]"

It is further alleged that after the making of said writing obligatory such proceedings were had in the matter of said petition that on the sixth day of September, 1886, by the order and decree of the said circuit court for the county of Kent, in chancery, the said plaintiff recovered of said defendant William D. Mansfield his costs in the matter of the petition aforesaid, and the special master's fees, and a solicitor's fee of $30, to be taxed, and the said defendant William D. Mansfield was adjudged to pay the same to plaintiff; and that on the eighteenth day of September, 1886, the said costs and fees were in due form of law taxed against the said defendant William D. Mansfield at the sum of $229.59, and that the defendants became and were liable to pay the same, etc.

To this declaration the defendants pleaded the general issue, and gave notice—

"That the said D. Lansing Skinner hath not been duly appointed receiver of the estate and effects of the Michigan Mutual Fire Insurance Company, in said declaration named; that the said alleged Michigan Mutual Fire Insurance Company has not and never had any legal existence, nor any capacity to sue or be sued; and that all proceedings relating to said alleged receivership, and the claim of said William D. Mansfield, and the reference thereof, and the order and decree thereon, in said declaration mentioned, including the said order for security for costs, and the taxation thereof, were and are without authority of law, and void; * * * that the said writing obligatory in the said declaration mentioned was never delivered by the said alleged makers thereof, nor by any or either of them, nor by any person by the authority or on behalf of them, or any or either of them, to

Digitized by Google

the said plaintiff, or to any person for him or for his use."

On April 30, 1887, the cause came on for trial in the circuit court for the county of Kent, before Judge Montgomery without a jury; and on the twenty-ninth day of October, 1887, he filed in the cause the following findings of fact and law:

"A finding having been requested in this cause, I, Robert M. Montgomery, judge of said court, before whom said cause was tried, do find the facts appearing on said trial to be as follows:

"1. That on the twenty-fifth day of August, 1884, plaintiff was, by the circuit court for the county of Kent, in chancery, appointed receiver of the Michigan Mutual Fire Insurance Company, and that he qualified, and undertook the execution of the trust. The Michigan Mutual Fire Insurance Company aforesaid was organized under Act No. 175, Laws of 1883, of the Legislature of Michigan, and the said appointment of plaintiff, as such receiver, was made upon the bill of complaint and motion of the Commissioner of Insurance for the State of Michigan, under and by virtue of section 15 of said act, in a proceeding instituted by and in the name of said Commissioner of Insurance against said company as a corporation.

"2. That while plaintiff was engaged in performing his duties as receiver, defendant Mansfield, April 13, 1885, filed his petition in the circuit court for the county of Kent, in chancery, in the cause in which the plaintiff had been appointed receiver, in which he set forth that the Michigan Mutual Fire Insurance Company was indebted to him for services as its secretary in the sum of several thousand dollars, and prayed that plaintiff, as receiver, be required to pay the same out of the funds of the company in his hands. Plaintiff, as receiver, answered the petition, denying that any sum was due Mansfield, and claimed a large sum due the company from him. Issue was joined on this petition and answer, and the matter was referred to a referee to take proofs, and state the account between defendant Mansfield and the company. June 8, 1885, upon the petition of plaintiff as receiver, defendant Mansfield was ordered to file security, to be approved by the court or the register thereof, for the costs which might be taxed against him in the matter of his petition. June 8, 1885, defendant Mansfield, or his solicitors, delivered to the

Digitized by Google

register of the circuit court for the county of Kent, in chancery, the following undertaking for costs, signed by himself and defendants Lucas and Bennett [omitting formal parts]:

"'WHEREAS, The said William D. Mansfield has filed his petition in the above-entitled cause, praying that an order be made therein directing D. Lansing Skinner, receiver of the said Michigan Mutual Fire Insurance Company, to show cause, if any, why the claim of said William D. Mansfield should not be allowed; and

"'WHEREAS, The said D. Lansing Skinner, receiver aforesaid, has filed his answer thereto, denying said claim, and showing why the same should not be allowed; and

"'WHEREAS, An order has been made in said cause referring said matter for examination to John S. Lawrence, Esq., as master, for the purpose of taking proofs, and reporting the same to this court; and

"'WHEREAS, Also an order has been made herein requiring said petitioner, William D. Mansfield, to furnish security for any costs that may be adjudged against him by reason of such reference to said master;

"'Now, therefore, we, William D. Mansfield as principal, and Thomas J. Lucas and William B. Bennett as sureties, undertake and agree to pay to the said D. Lansing Skinner, receiver aforesaid, any and all costs incurred by reasons of such reference, if the costs of such reference be adjudged against the said William D. Mansfield; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators; then and in that event this undertaking shall be null and void; otherwise, to remain in full force and virtue.

"'W. D. MANSFIELD. [L. S.]
"'THOMAS J. LUCAS. [L. S.]
"'W. B. BENNETT. [L. S.]'

"Afterwards the reference aforesaid proceeded, and the referee made up his report, finding defendant Mansfield to be owing the company a large sum of money. This report the referee refused to file without the payment of his fees, which were $187.50; and thereupon, upon petition of plaintiff as receiver, Mansfield was ordered to pay the referee's fees within five days after service on him, or his solicitor, of a certified copy of the order of the court requiring it, and, in default of such payment by Mansfield, plaintiff, as receiver, was ordered to pay the same out of the company's funds in his hands. This order was served as therein directed. Mansfield did not pay the referee's fees. The plaintiff paid the same out of the company's funds in his hands.

Digitized by Google

"The referee's report was filed, and, after argument of exceptions taken and appearing in referee's report, was confirmed; and plaintiff, as receiver, recovered $1,258.92 by the final order and decree of the court, with the costs of the proceedings, which were afterwards, September 18, 1886, taxed at the sum of $229.59. Demand was made on defendants prior to suit for the payment of said costs so taxed, and the same was refused.

"3. As a conclusion of law, I find that plaintiff is entitled to judgment for $229.59, the aforesaid costs, with interest at 6 per cent. from December 30, 1886, the day of commencement of suit, amounting at the date of this finding, to $11.40.

"Let judgment be entered against defendants for $240.99, and the costs in this suit to be taxed.

"ROBERT M. MONTGOMERY,
"*October* 29, 1887. Circuit Judge."

To which said finding of the said court, and the rulings of law embodied therein, the counsel for said defendants Lucas and Bennett, within four days after filing of the said finding with the said clerk, did, in behalf of the said defendants Lucas and Bennett, allege exceptions in writing, and file the same with the said clerk, as follows, to wit (omitting formal parts):

"And now come the said defendants Thomas J. Lucas and William B. Bennett, by William E. Grove, their attorney, and allege exceptions to the matters of law embodied in the finding made and filed in this cause, as follows:

"1. They except to the finding 'that on the twenty-fifth day of August, 1884, plaintiff was, by the circuit court for the county of Kent, in chancery, appointed receiver of the Michigan Mutual Fire Insurance Company, and that he qualified and undertook the execution of the trust,' because there was no evidence in the case to support the said finding.

"2. They except to the finding, 'June 8, 1885, defendant Mansfield, or his solicitor, delivered to the register of the circuit court for the county of Kent, in chancery, the undertaking for costs, signed by himself and defendants Lucas and Bennett,' which is set out in said finding, because there was no evidence in the case to support the said finding.

Digitized by Google

"3. They except to the finding that 'as a conclusion of law, I find that plaintiff is entitled to judgment for $229.59, the aforesaid costs, with interest at 6 per cent. from December 30, 1886, the day of commencement of suit, amounting at the date of this finding to $11.40,' because there was no evidence in the case to support said finding, nor to support the finding of facts upon which said conclusion rests.

"*Dated October* 31, 1887."

On October 29, 1887, judgment was entered in the cause in favor of the plaintiff for the amount of $240.99, and defendants bring error.

Defendants' first assignment of error is as follows:

"The court erred in overruling the objections of said appellants to the introduction in evidence of the files, records, and proceedings in a certain cause in the circuit court for the county of Kent, in chancery, wherein Eugene Pringle, as Commissioner of Insurance for the State of Michigan, was complainant, and the Michigan Mutual Fire Insurance Company was defendant, and to all testimony on the part of the plaintiff; for the reason that it appeared from the said bill of complaint, and the proceedings thereon, which resulted in the appointment of a receiver, that the defendant in that cause, the Michigan Mutual Fire Insurance Company, was proceeded against in said cause as a fire insurance corporation, organized and existing under the provisions of Act No. 175, Laws of 1883 of this State, which had been held to be unconstitutional,[1] and because all proceedings in said cause were without jurisdiction and void, being based on said void law, and therefore said plaintiff could not prove his capacity of receiver thereby."

We think the defendants should not be heard to question the appointment of plaintiff as receiver in this collateral way.

It appeared upon the trial that in 1883 the Michigan Mutual Fire Insurance Company was organized under Act No. 175, Laws of 1883, and commenced to do business as an insurance company. In August, 1884, the Commissioner of Insurance filed his bill in the circuit court for the county of Kent, in chancery, to close up said company. Subpœna and

[1] See *Skinner v. Wilhelm*, 63 Mich. 568.

Digitized by Google

order to show cause having been served, August 25, 1884, plaintiff was appointed receiver of said company by the court. He qualified, and entered upon the discharge of his duties, and acted as receiver for more than two years, collected and disbursed large sums of money, paid dividends on the indebtedness of the company, conducted litigation brought against him, and in other ways performed the duties usually incident to the office of receiver. Defendant William D. Mansfield had been secretary of the company, and defendants Lucas and Bennett were his bondsmen for the faithful performance of his duties as such secretary.

On October 9, 1884, defendant Mansfield filed a petition in the court in the cause in which plaintiff had been appointed receiver, praying that he and his sureties might be discharged from all liability on his secretary's bond. The plaintiff answered the petition, and the prayer of the petitioner was denied. April 13, 1885, defendant Mansfield filed another petition in said court and cause, setting up that the company was indebted to him to the amount of over $6,000, and praying that plaintiff as receiver be ordered to pay the same out of the company's funds in his hands.

Plaintiff answered the petition, claiming a balance due the company from defendant, and that his bond as secretary was forfeited. On the coming in of this answer, by consent the matters in issue were referred to Mr. John S. Lawrence to take proofs, and examine and state the account between Mansfield and the company.

After this reference, plaintiff petitioned the court for an order requiring Mansfield to furnish security for costs. June 8, 1885, the court made an order requiring Mansfield to—

"Furnish security, to be approved by the court or the register thereof, for all costs which may be taxed against him in this matter."

June 13, 1885, Mr. J. M. Jamison, who was Mansfield's

Digitized by Google

solicitor in the matter of the last petition, delivered to Mr. Harvey, the register of the court, the undertaking in suit. Harvey received it, and retained it. Defendant Lucas appeared before the register, and justified in the sum of $300. Defendant Bennett did not justify, and the register never approved the bond, but kept it in his possession, and produced it on the trial.

Mr. Lawrence, the referee, refused to file his report until his fees were paid. Plaintiff petitioned the court to fix the referee's fees, and require Mansfield to pay the same. On April 6, 1886, the court fixed the referee's fees at $187.50, and required Mansfield to pay the same within five days after service upon his solicitor of notice of the court's order, and, if he did not, that plaintiff should, and tax the same as part of his costs if successful. This order was duly served. Mansfield did not pay, and plaintiff did, and the referee filed his report. The referee's report came on for hearing, and was confirmed, and Mansfield was adjudged to owe the company a considerable sum of money, and plaintiff recovered costs, which were taxed at $229.59. Demand was made upon the defendants for these costs, and refused, and this suit is brought to recover the amount thereof, with interest.

This conclusively shows that the defendants have all of them fully and completely recognized the plaintiff as receiver. The defendant Mansfield appeared in the cause, and submitted himself to the jurisdiction of the court, brought his petition against the plaintiff in that cause as receiver, and that is the cause in which these costs which this suit is brought to recover were made. These costs followed and were occasioned by the defendant Mansfield filing his petition in the cause in which plaintiff was claiming to act as receiver. The defendants Lucas and Bennett were sureties on the bond of defendant Mansfield as secretary of the company, and became sureties for costs in the undertaking in this cause, which recites the fact that plaintiff is receiver of the com-

Digitized by Google

pany, and generally and fully recognizes his position as such.

This Court said, in *Burton v. Schildbach*, 45 Mich. 504 (8 N. W. Rep. 497):

"It is objected that the receiver was not legally appointed because Schildbach was not made a party to Geller's bill; but Schildbach has recognized the receivership by his subsequent payments, and he should not be heard to question the appointment in this collateral way."

Scott v. Duncombe, 49 Barb. 73, was a case where the defendant, in an action brought by a receiver as such, put in a demurrer, which on motion was stricken out as frivolous, and she, on applying to the court for leave to answer, was allowed to do so, provided that she executed a bond, with sureties, conditioned that, if the plaintiff should finally recover against her, she would obey such judgment, and would pay the plaintiff the sum thereby directed to be paid. Such bond was thereupon executed. In an action thereon, it was held that the execution of such bond to the plaintiff *as receiver* must be deemed an admission by the obligors, not only that the plaintiff had been duly appointed receiver, but also that the receiver was authorized to bring the action mentioned in the condition of the bond.

Defendants' second assignment of error is as follows:

"The court erred in overruling the objections of said appellants to the introduction in evidence of the undertaking mentioned and set out in full in the declaration in this cause, for the reasons previously stated as grounds of objections to the aforesaid files, records, and proceedings, and to all testimony on the part of the plaintiff; and for the further reason that no delivery of the said undertaking was proved. The condition of the order to file security was that said William D. Mansfield should file security, to be approved by the court or register thereof, and no approval was ever made of said undertaking. It was never filed in the cause. And, further, that security for costs in chancery cases, should be given in the form of a bond with a fixed penalty."

We see no force in this objection. Chancery rule 6 provides as follows:

Digitized by Google

"In all cases where the complainant or complainants are not residents of this State, before process shall issue, a bond in the penal sum of one hundred dollars shall be filed with the register; * * * and the court, or a circuit court commissioner, may, upon motion, upon sufficient cause shown, require a new bond to be filed in the same or an additional amount; and may also require security where complainants are residents of this State, if the justice of the case demand it."

This rule does not prescribe any particular form for the security. Besides, the question of the form of the security is wholly immaterial, and could only become material when application is made for judgment against the sureties at the same time that judgment is rendered against the principal. *Brion v. Kennedy*, 47 Mich. 499 (11 N. W. Rep. 288).

The objection urged that the bond or undertaking was not approved, is of no consequence to the defendants. This was for the protection of the plaintiff, and for his benefit, and was not a condition precedent to the liability of the defendants.

The objection that the undertaking was not delivered to the plaintiff, or any one for his use, is not supported by the facts. The register of the court testifies that it was delivered to him, and retained by him, as the security for costs in the case.

The following are the third and fourth assignments of error, and may be considered together:

"3. The court erred in sustaining the objection of the plaintiff and appellee to the question put to the witness Cornelius L. Harvey, as follows: 'Whether you ever accepted the bond as a compliance with the order that has been put in evidence here, requiring security for costs to be given in that case; whether you have received it as a compliance with that order,'—and in ruling that said question was leading, and ought not to be allowed.

"4. The court erred in sustaining the objection of the said plaintiff and appellee to the question put to said witness Harvey, as follows: 'Did you ever approve of that bond?'—and in excluding the answer thereto, which was as follows: 'I

Digitized by Google

never did,'—after the same had been received under the objection, and in ruling that the said question ought not to be allowed, and that the answer thereto should be excluded; and in sustaining the said objection that the counsel for said appellants 'was attempting to prove the non-delivery of the bond under pleadings which do not admit of that evidence."

We think the court was correct in this ruling. The first question was not only leading, but wholly immaterial. Whether Harvey received it in compliance with the order of the court or not could in no way affect the rights of the plaintiff. The important fact was the execution and delivery of the bond to Harvey for the benefit of plaintiff. That this was done no one disputes; and how Harvey viewed it, for what purpose he received it, or whether or not he approved it, could not in any manner affect the plaintiff's right of recovery upon it; and the defendants were in nowise injured by the rejection of the evidence.

The fifth and sixth assignments of error are as follows:

"5. The court erred in finding as a fact in this case 'that on the twenty-fifth day of August, 1884, plaintiff was, by the circuit court for the county of Kent, in chancery, appointed receiver of the Michigan Mutual Fire Insurance Company, and that he qualified and undertook the execution of the trust,' because there was no evidence in the case to support said finding.

"6. The court erred in finding as a fact that 'June 8, 1885, defendant Mansfield, or his solicitor, delivered to the register of the circuit court for the county of Kent, in chancery, the undertaking for costs, signed by himself and defendants Lucas and Bennett,' which is set out in said finding, because there was no evidence in the case to support said finding."

The questions raised under these assignments of error have been disposed of in our remarks upon the first and second assignments of error.

The seventh and eighth assignments of error are as follows:

Digitized by Google

"7. The court erred in finding that, 'as a conclusion of law, I find that plaintiff is entitled to judgment for $229.59, the aforesaid costs, with interest at six per cent. from December 30, 1886, the day of commencement of suit, amounting, at the date of this finding, to $11.40,' because there was no evidence in the case to support said finding, nor to support the finding of facts upon which said conclusion rests.

"8. The said court erred in rendering the said judgment against the defendants, and in favor of the plaintiff, because the facts found do not support the said judgment, and because, upon the said finding of facts, judgment should have been rendered in favor of the defendants, and against the plaintiff."

We need only add, in answer to these assignments, that from the whole case we have no doubt that the plaintiff was entitled to recover; and the findings of the court, both as to the facts and matters of law, are correct.

The judgment is affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. MORSE, J., did not sit.

Digitized by Google

68 487
109 21

GEORGE M. DAYTON v. HATTIE DAYTON.

Equity practice—Appeal—Weight given to determination of circuit judge—Bill for discharge of mortgage—Tender—Retention as bill for redemption.

1. Where the appellate court can arrive at no *decided* convictions from the testimony, which lead to a different conclusion than that reached by the court below, its decree will not be disturbed, especially where such testimony is taken in open court, when the circuit judge has an opportunity of seeing the witnesses and hearing them testify.
2. Where a bill is filed for the *discharge* of a mortgage on the ground of a *tender* of the amount due, which tender is found to have been insufficient, the bill may be retained as a bill to redeem under the general prayer for relief, the complainant offering in his bill to pay whatever may be found due the defendant.

Appeal from Ingham. (Gridley, J.) Argued January 18, 1888. Decided February 2, 1888.

Bill filed to discharge a mortgage, and for the statutory penalty, etc. Both parties appeal. Decree entered in appellate court allowing complainant to redeem on specified terms, etc. The facts are stated in the opinion.

R. A. Montgomery, for complainant.

Jason E. Nichols, for defendant.

CHAMPLIN, J. The dispute in this case arises over the amount claimed by the defendant to be due upon a certain bond and mortgage.

Complainant became purchaser of the land subsequent to the mortgage, and he claims that two items—one of $185, and another of $150—should be applied and indorsed thereon. Acting upon this claim, he made a tender to the defendant of the balance due upon the mortgage, taking out the

Digitized by Google

amount of the two items, and demanded a discharge. The tender was refused. Complainant thereupon filed this bill of complaint, praying to have the mortgage declared extinguished and void, and requiring defendant to discharge the mortgage, and that defendant be decreed to pay to complainant a penalty of $100, incurred for violation of section 5704, How. Stat., and for such further and such other relief as the nature of the case shall require, and as shall be agreeable to equity.

The case was heard upon pleadings and proofs in the court below, taken in open court before the circuit judge, and he decreed that the item of $185 should be allowed and indorsed as of the date of July 1, 1882; that the item of $150 was not paid to defendant to be applied on said mortgage, and he disallowed said item. He decreed the tender insufficient, but allowed a new tender to be made of the amount due, which, if made or tendered into court, should operate to discharge the lien of the mortgage; and directed the execution of a discharge by defendant, and, if complainant failed to make the tender in the time fixed in the decree, the bill of complaint was to be dismissed. Costs were awarded to defendant.

Both parties have appealed from this decree.

Both of the disputed items arose out of indebtedness of defendant's husband, who is a brother of the complainant. As to the $185 item, complainant's contention is that defendant's husband was guardian for a niece of his, who, being under an engagement to marry, wanted some money to obtain an outfit; that defendant's husband was unable at the time to furnish the money, and Mr. Reed, a brother-in-law, offered to advance the money for defendant's husband, which offer was accepted; that thereupon Reed obtained the money, by the aid of complainant's indorsement, from the Savings Bank; that the note was renewed from time to time until it reached the sum of $185, when Mr. Reed requested defend-

Digitized by Google

ant's husband to obtain consent of his wife to let complainant pay the note, and apply it upon the mortgage debt which he owed to defendant; that he manifested his willingness to have the note so paid, if his wife was willing; that Mr. Reed saw defendant, and she agreed that, if complainant would pay the note, it should apply as payment to her upon the mortgage, and complainant thereupon paid the note. This claim upon the part of the complainant was controverted by defendant, and the testimony *pro* and *con* was contradictory.

It also appeared that at some time prior to this the defendant's husband had assigned to Mr. Reed two judgments which, when collected, should apply towards payment of the bank note; that Reed had succeeded in collecting $12, but the balance is uncollectible at the present time. These judgments still stand assigned to Mr. Reed. Why they were not re-assigned at the time the arrangements was claimed to have been made, does not appear. The testimony shows that they are worthless, and may have been so considered by the parties.

The $150 item, as claimed by complainant, arose in this way: Defendant's husband requested complainant to let him have $150, to apply on the mortgage due his wife; that he had just received word that his son was sick at Arkansas, and he wished to go to him, and his necessity was urgent; that defendant had demanded payment of the mortgage debt, and had been quite urgent for payment; that he got the $150, and paid it to defendant, to be applied upon the mortgage. The testimony over this item was also conflicting; and we may say that upon the whole testimony in the case it is difficult to arrive at a satisfactory conclusion from the weight of testimony wherein the merits lie.

Where we can arrive at no decided convictions, from the testimony, which lead us to a different conclusion than that reached by the court below, we are not inclined to disturb

Digitized by Google

the decree made by the court, especially where the testimony is taken in open court, when the circuit judge has the opportunity of seeing and hearing the witnesses testify.

We think, however, that the $12 paid to Mr. Reed should be deducted from the $185, leaving $173 to be indorsed upon the mortgage debt as of July 1, 1882, and, as so modified, the decree as to these two items will be affirmed. It follows that the amount tendered was insufficient to discharge the lien of the mortgage, and the prayer of the bill based upon the tender must be denied. The complainant, however, in his bill offers to pay whatever may be found due to defendant, and, under his prayer for general relief, the bill may be retained, and treated as a bill to redeem.

The *data* contained in the record is not quite clear as to the times when these disputed items accrued. There should be added to the $1,440 tendered, the $12, and interest thereon from July 1, 1882, to the fourth day of June, 1883, when the tender was made; also the item of $150 from the time it was obtained to the time of the tender. The testimony leaves the exact date indefinite, but it shows that it was sometime in the spring of 1883. It will not be far out of the way to fix the date as the fifteenth of April, 1883. Computing the interest at 8½ per cent. upon these items to the date of the tender, they amount to $164.57, which, added to the $1,440 tendered, makes $1,604.57 due June 4, 1883. The interest at 8½ per cent. upon this sum to February 2, 1888, is $635.71, making the total sum due at the last-named date, $2,240.28.

A decree will be entered here permitting complainant to redeem from said mortgage upon paying to defendant within 60 days from February 2, 1888, the sum of $2,240.28, with interest from that date at 8½ per cent., and the costs of the defendant in the court below, and the decree will provide in default of such payment for a sale of the mortgage premises, and barring complainant from all equity of redemption, and such other provisions as are usually embraced in decrees for

Digitized by Google

the redemption of mortgaged premises. Neither party will recover costs in this Court, as neither party prevails upon the appeal.

The decree entered will, with the record, be remanded to the circuit court for the county of Ingham for execution.

The other Justices concurred.

68 441
89 244
68 441
117 302
68 441
f119 217
68 441
126 350
68 441
157 1640

THE WROUGHT IRON BRIDGE COMPANY OF CANTON, OHIO, v. THE TOWNSHIP OF JASPER.

Townships—Allotment of town-line highway for purposes of supervision and repair—Contract for building bridge—Authority of commissioner of highways—Ratification.

1. Where a township-line road has been allotted, under the statute, between two townships, *each* becomes liable to keep *its* portion in repair, and *neither* township can legally obligate itself to aid in the erection of a bridge forming a part of that portion of said highway allotted to the other township.
2. A township cannot ratify a contract it could not legally enter into in the first instance.

Case made from Midland. (Hart, J.) Argued January 20, 1888. Decided February 2, 1888.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Frank A. Dean and *H. L. Fairchild*, for appellant.

M. H. Stanford, for defendant.

LONG, J. Plaintiff brought this action in the circuit court for Midland county against the defendant, to recover the amount claimed to be due upon a certain contract made

Digitized by Google

June 22, 1882, between the plaintiff and the townships of Jasper, Midland county, and Bethany, Gratiot county, for the construction of an iron bridge over Pine river, on the line between said townships.

On February 19, 1887, the cause came on for trial before the court without a jury, and the court filed in the cause the following findings of fact and law:

"On the twenty-second day of June, A. D. 1882, a contract was entered into by and between the plaintiff, and the township of Bethany, Gratiot county, and the township of Jasper, Midland county. It was executed by James M. Johnson, on the part of Bethany, and by John A. Woodard, on the part of Jasper, each acting as highway commissioner, a duplicate of which was filed with the clerk of the defendant, and reads as follows, to wit:

"'This agreement, made the twenty-second day of June, A. D. 1882, by and between The Wrought Iron Bridge Company of Canton, Stark county, Ohio, of the first part, and the towns of Jasper and Bethany, in Midland and Gratiot counties, State of Michigan, of the second part, witnesseth:

"'That said first party hereby agrees to furnish all material, and to construct and to complete, ready for travel, the superstructure, for a wrought iron bridge over Pine river, on the county line between Jasper and Bethany, known as the Bailey bridge, in said county and State; said bridge to be seventy feet long, extreme length, to be built in one span of sixty-seven feet in the clear, to have one roadway twelve feet clear width, and 0 footway 0 feet clear width, and to be constructed in accordance with specifications and plan annexed to the original agreement, of which this agreement is a duplicate.

"'The said second party hereby agrees to have the substructure ready for the erection of, and at right angles to the line of, said superstructure, on or about the twenty-fifth day of August, A. D. 1882.

"'And said first party agrees to have the superstructure complete on or before the first day of September, 1882.

"'In consideration of the foregoing material and work to be furnished and executed by said first party, said second party hereby agrees to pay said first party the sum of eight hundred and ninety-two and 50-100 dollars, in manner following, to wit,———hundred dollars on the delivery of the furnished iron work at the nearest railroad station to the bridge site, and the balance of the above amount on the completion of said superstructure ready for travel,

Digitized by Google

and according to plan and specification annexed to the original agreement; said payment to be made in an order on the treasurer of the respective towns for equal amounts, payable February 1, 1883, at Darrough & Co.'s bank, St. Louis: Provided, that, in case said second party fail to have the substructure completed and ready for said bridge span by the date hereinbefore specified, said second party hereby agrees to pay said first party eighty per cent. of the contract price for said bridge on the delivery of the finished iron work at the bridge site; and for the performance of each and every article of this agreement the said parties hereby bind themselves by these presents.

"'In testimony whereof, witness the signatures of the president and secretary and the corporate seal of the said first party, as provided by its by-laws, and the official signature and seals of said second party; but it is mutually agreed and understood that this contract shall not become binding on said first party until countersigned by one of its duly elected officers or agents having a written power of attorney duly executed by said first party; nor shall any settlement or payment made under this contract become binding on said first party unless made or acknowledged by one of its agents having specific written authority to make settlement of and receive payment under this contract.

"'WROUGHT IRON BRIDGE COMPANY.

"'By C. Aultman, President.

"'Attest: C. H. JACKSON, Secretary.

"'JAMES M. JOHNSON, Commissioner Bethany.

"'JOHN A. WOODARD, Commissioner Jasper.

"'Countersigned at Jasper, the twenty-second day of June, A. D. 1882.

"'R. D. WHEATON, Agent Wrought Iron Bridge Co.'

"The bridge mentioned in the contract was located on the township line between these two townships where it crosses Pine river, about one and one-half miles from the south-east corner of the township of Jasper.

"Before entering into the contract, the commissioner of the township of Jasper posted notices in five of the most public places in that township two weeks before letting the contract. The notices were for receiving sealed proposals to build a bridge across Pine river, which were to be received on the ground where the bridge was to be built, and at the time of the sale of the job, which was June 22, at 10 o'clock in the forenoon. The plaintiff's proposal was the only one received. About forty people were present at the sale; and an effort was made to get other bids before the job was let to the plaintiff, but none was received. The commissioners of both

Digitized by Google

townships were present, and the clerk of Jasper was present a part of the time. The supervisor and clerk of Jasper were asked to sign the contract, but refused.

"The bridge was built in accordance with the contract by the plaintiff, and completed about September 1, A. D. 1882. The abutments were built by one Mr. Weaver, and paid for in orders, one-half of the cost of which in orders drawn by Mr. Woodard, as commissioner of Jasper, and the other half by the commissioner of Bethany. The defendant has never paid anything on this contract, either in money or orders.

"A report was made to the township by the commissioner, but no appropriation was made by the township to pay it. One-half of the contract price, with interest at 7 per cent. from February 1, 1883, to the present time, amounts to five hundred and seventy-two dollars and six cents.

"The plaintiff nor its agent, R. D. Wheaton, had any actual knowledge that the township claimed the commissioner had exceeded his authority in making this contract, by reason of that part of the road having been allotted to Bethany.

"In September, 1864, boards of highway commissioners of Bethany and Jasper, at a joint meeting, determined which part of the road between the two townships each should work, and made the following record September 12, 1864:

"'We, the highway commissioners of the townships of Bethany and Jasper, have this date entered into an agreement as follows, to wit: That the township of Jasper will take, commencing at the corner-post of the south-west corner of Jasper, Midland county, thence east, between Jasper and Bethany, on the county line, three miles, to be worked by said township of Jasper; the other three miles east to be worked by the township of Bethany.

"'MARSHEL DEPEW,
"'NICHALOUS DEPEW,
"'BENSON B. BAILEY,
"'Commissioners of Highways of Jasper.
"'W. L. STEBBINS,
"'H. T. BARTELLO,
"'JOHN S. NEVENS,
"'Commissioners of Highways of Bethany.'

"This division or allotment has never been changed or altered since, and, at the time the division was made, the road had not been opened; since which time, and up to the building of the bridge in question, each township has opened and repaired the road allotted to each by this order, except some expenditures that were made on a bridge and approaches

Digitized by Google

that was built almost nineteen rods below the line into Jasper.

"Bethany did not expend any money on that bridge, because it was claimed the bridge was not on the line. Jasper did expend some money on the approaches. This old bridge was built by county appropriations, Midland county paying one hundred dollars and Gratiot county paying ninety-nine dollars; the bridge costing one hundred and ninety-nine dollars.

"The commissioners of Jasper knew, at the time the job to build the bridge in suit was sold, that that part of the highway on which the bridge stood had been allotted to Bethany, and had been worked and maintained by it, and knew the order had not been changed by any action of the two townships.

"A vote was taken, but without notice previously given, at a township meeting of Jasper, by the inhabitants, on the question as to whether the township would appropriate three hundred dollars towards the building a bridge at this point, which was voted down. It was then contemplated to build a wooden bridge, and the vote was taken at the time of the spring election in 1882.

"After the bridge was built, the abutments gave out, and the town board of the township of Jasper gave to the township of Bethany one hundred dollars to assist them in rebuilding the abutments, and putting the bridge in repair, so it could be used. This was in the summer of 1884.

"The question to be determined is, did the commissioner of highways of Jasper bind the township by making and executing this contract? The precise question involved in this controversy has not, so far as I know, ever been before the Supreme Court, and cannot be said to be free from doubt. The bridge being on that part of the highway allotted to Bethany, I think it was the duty of Bethany to have built and maintained a bridge at this point, under the law, and Jasper was not legally bound to expend anything in its construction.

"The bridge was a part of the highway. It may also be that, had no allotment been made, the contract entered into would have been a valid one, and binding on the defendant; but, if I am right in the above view, and the allotment having been made, that part of the highway became a part of and one of the highways of Bethany for highway purposes, and remains so until the allotment has been changed by the joint act of the commissioners, if, indeed, they have any

Digitized by Google

authority, under our present law, to make any change after it once has been made.

"But it may be said it is hardship on the plaintiff, who did the work in good faith, and should have its pay. That is true; but it would equally be a hardship for the township to be compelled to pay what it legally ought not to pay after having expended money and built and maintained that part of the road allotted to it. Besides, the plaintiff knew this was a township line, and its authorized agent, R. D. Wheaton, who did the business for the plaintiff, was a resident of this State, and must be presumed to know the law of the State. I therefore conclude, the commissioner of Jasper had no authority to enter into the contract, and by so doing he did not bind the township.

"Ordinary judgment should be entered for the defendant, and for costs to be taxed.

"HENRY HART, Circuit Judge."

To which findings of the circuit judge the said plaintiff afterwards, and on the second day of September, 1887, filed its written exceptions as follows:

"Now comes the said plaintiff, by Frank A. Dean and H. L. Fairchild, its attorneys, and files its exceptions to the findings of law by said court filed herein, as follows:

"*First.* The said plaintiff hereby excepts to the finding and conclusion of law by said court which is as follows: 'The bridge being on that part of the highway allotted to Bethany, I think it was the duty of Bethany to have built and maintained a bridge at this point, under the law, and Jasper was not legally bound to expend anything in its construction.'

"*Second.* The said plaintiff excepts to the conclusion and finding of law of said court which is as follows: 'The bridge was a part of the highway. It may also be that, had no allotment been made, the contract entered into would have been a valid one, and binding on the defendant; but, if I am right in the above view, and the allotment having been made, that part of the highway became a part of and one of the highways of Bethany for highway purposes, and remains so until the allotment has been changed by the joint act of the commissioners, if, indeed, they have any authority, under our present law, to make any changes after it once has been made.'

"*Third.* The said plaintiff excepts to the finding and conclusion of law by the court which is as follows: 'I there-

Digitized by Google

fore conclude, the commissioner of Jasper had no authority to enter into the contract, and by so doing he did not bind the township.'

"*Fourth.* The said plaintiff excepts to the finding and conclusion of law by said court which is as follows: 'Ordinary judgment should be entered for the defendant, and for the costs to be taxed.'

"*Fifth.* The said plaintiff excepts to the judgment of the said court rendered against it and in favor of the defendant in this cause for the further reason that the facts found by said court do not support said judgment; and, further, because under the facts found the plaintiff was as matter of law entitled to judgment in its favor.

"*September* 2, 1887."

On the fourth day of June, 1887, judgment was entered in said cause for the defendant, with costs, and the plaintiff brings error.

Under the facts found by the court the record presents but one question: Was the contract entered into by the commissioner of highways with the plaintiff one by which the defendant could be bound? That part of the highway on which the bridge was constructed was allotted to the township of Bethany in 1864, and since that time has been maintained and worked by it, and the allotment has never been changed. The law in force at the time of this allotment reads as follows:

"Upon laying out, altering, or discontinuing a highway on the line between adjoining townships, or upon determining what part of such highway shall be made and repaired by each township, the commissioners of such adjoining townships shall act jointly; and application may be made to the commissioners of either township, who shall notify the commissioners of the adjoining township of the time and place of meeting; and said commissioners of adjoining townships shall proceed as before provided, and their return shall be filed in the office of the township clerk of each township; and each township shall have all the rights, and be subject to all the liabilities, in relation to the part of such highway to be made and repaired by such township, *as if the same was located wholly in such township.*" Section 1255, Comp. Laws 1871.

Digitized by Google

While some changes have been made since that time relative to the powers and duties of commissioners of highways, this provision as to the opening and maintaining of town-line roads has remained substantially unchanged.

Section 20, chap. 4, tit. 6, Rev. Stat. 1838, contains a provision for the opening and maintaining and allotment to the different townships of town-line roads, and section 21 of that chapter provides:

"Each district shall be considered as wholly belonging to the township to which it shall be allotted for the purpose of opening and improving the road and for keeping it in repair; and the commissioners shall cause such highway, and the partition and allotment thereof, to be recorded in the office of the township clerk in each of their respective townships."

In Rev. Stat. 1846, p. 135, § 16, the following provision appears in relation to the portion of town-line road allotted to a particular township:

"And each township shall have all the rights, and be subject to all the liabilities, in relation to the part of such highway to be made and repaired by such township, as if the same was located wholly in such township."

The same provision was re-enacted in 1857. Section 1057, Comp. Laws 1857. This was repealed in 1861, but was re-enacted, and appears as section 1255, Comp. Laws 1871, and was in force when this allotment in question was made.

Section 1307, How. Stat., was passed in 1881, being substantially the same as that passed in 1846, and was in force at the time the contract was let, and the bridge built, and is as follows:

"And such township * * * shall have all the rights, and be subject to all the liabilities, in relation to the part of such road so allotted, as if the same was located wholly in such township."

It was the duty of the township of Bethany to maintain and keep in repair that part of said road, and the township of Jasper had no more interest in that part of said highway

Digitized by Google

than it had in any other highway in the township of Bethany. It has no duty, by virtue of these statutes, devolving upon it, to keep or maintain or to repair any portion so allotted to Bethany.

Section 1445, How. Stat., makes it the duty of townships to keep in good repair, so that they shall be safe and convenient for public travel, all public highways, bridges, etc., that are within their jurisdiction, and under their care and control. Sections 1442 and 1443, passed in 1879 (Laws of 1879, p. 223), makes the township whose duty it is to keep any bridge in repair, liable for injuries sustained by reason of neglect, etc.

This Court held in *Sharp v. Township of Evergreen*, 67 Mich. 443 (35 N. W. Rep. 67), that, where a State road had been turned over by the statutes of 1836, and placed in the control and under the care and supervision of the highway commissioners of the several townships, by virtue of these statutes, the several line roads were placed under the jurisdiction of the townships between which such road passed, and that the commissioner of highways was in duty bound to keep it in good repair and safe for travel, and, failing in this, the township was liable for injuries occasioned by such fault or neglect of its commissioner.

The commissioner of highways of the township of Jasper, Midland county, had no control over that portion of the highway. He could not lawfully expend the highway funds of his township upon that portion of the highway, and he could not rightfully expend the moneys of his township in building or to assist in building a bridge there. The contract he entered into with the plaintiff could not bind the township of Jasper.

It is claimed, however, by the plaintiff, that the defendant township is in some way estopped from questioning the validity of the contract by its own act, or that there has been a ratification of the contract by the corporation. This is not

Digitized by Google

so. There may, in certain cases, be a ratification by the corporation of an unauthorized contract. It must, however, in such cases, appear that the contract was one which could in the first instance have been legally entered into by the corporate authorities. There may be cases where knowledge that work is being performed for the use and benefit of a corporation under an authorized contract, and the corporation afterwards accepts and makes use of the work done, would amount to a ratification, but this is not one of that class of cases.

Here the commissioner had no power to appropriate the funds of his township to highway uses, outside the territorial limits of his township, and this road where the bridge in question was built was as much outside such limits, under the allotment made, as though it laid wholly within the township of Bethany; and we find no act done by the corporate authorities that could in any manner be construed into a ratification of the act of the commissioner in making this contract with plaintiff. On the other hand, the clerk and supervisor of the township each refused to sign or recognize the validity of the contract at the time of the letting, and, when called upon to pay, refused to draw the order as demanded by the commissioner. The court was correct in its conclusions of law.

The judgment is affirmed, with costs.

The other Justices concurred.

Digitized by Google

68 451
88 649
68 451
99 626
68 451
107 659

LILLIE LANGTRY v. WAYNE CIRCUIT JUDGES.

Justices of the peace—Attachment—Service—Summons—Jurisdiction to render judgment—Non-resident defendants.

1. In *Borland v. Kingsbury*, 65 Mich. 59, it was held that personal service of a writ of attachment and inventory would not give jurisdiction if the affidavit was insufficient.
2. A justice's writ of attachment does not operate as a summons, and personal service of the writ, unless made after levy and accompanied by the statutory inventory, is insufficient to give jurisdiction over the defendant.
3. The policy of the statute in regard to non-residents requires that they shall have a speedy hearing, and if *actually* summoned they have no delay beyond four days to keep them from going to trial.

Application for *mandamus* to set aside attachment proceedings. Submitted January 24, 1888. Granted February 2, 1888. The facts are stated in the opinion.

George H. Prentis, for relator.

T. S. Jerome, for respondents.

CAMPBELL, J. Relator asks to have certain proceedings set aside for want of jurisdiction in a justice to render judgment against her on the default which was entered.

Suit was brought against her before a justice of Wayne county by attachment. The ground of the attachment was her non-residence, and no question is made on the sufficiency of the affidavit. The writ is a statutory one, and the form is given in section 6839, How. Stat. It is upon this that the controversy arises.

The statute declares as follows:

"Every attachment shall state the amount claimed by the plaintiff, and shall command any constable of the county in

Digitized by Google

which the justice resides to attact so much of the goods and chattels of the defendant (except such as are exempt by law from execution), as will be sufficient to satisfy such demand, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in such attachment, and to return the same at a time therein to be specified, not less than six nor more than twelve days from the date thereof."

It will be observed that the writ contains no summons clause, and that a summons against a non-resident must be made returnable not less than two, nor more than four, days from the date thereof. Section 6830.

Section 6840 provides how an attachment shall be executed. It is to be executed at least six days before the return-day, by seizing a sufficient amount of goods and chattels to satisfy the claim and costs, and making an inventory thereof, and serving a copy of said attachment and inventory on the defendant, if found within the county. If defendant is not found in the county, a copy of the attachment and inventory is to be served at defendant's last residence, or on the person in whose possession the goods are found.

By section 6850 it is provided that there shall be no judgment unless (1) on seizure of property of one or more defendants, or (2) on personal service of process or appearance, or (3) where a garnishee's liability has been fixed.

Respondents claim that the attachment operates as a summons, and service of it personally is sufficient with or without service on property and service of inventory. Relator claims that the writ is not a summons, and cannot be served except as directed by the statute.

Proceedings by attachment are entirely statutory in their inception, and we must look to the statutes to ascertain their requisites. The form of a summons is given by section 6826, and that contains a distinct warning to the defendant to appear. There is no such warning in the attachment writ, which merely requires a seizure of property for safe-keeping. If the attachment is personally served, the subsequent pro-

Digitized by Google

ceedings are as in case of summons. Otherwise there must be a continuance. Section 6846.

The question before us has never been distinctly presented before. In *Borland v. Kingsbury*, 65 Mich. 59 (31 N. W. Rep. 620), it was held that personal service of the writ and inventory would not give jurisdiction if the affidavit was insufficient. If the writ could be regarded as a summons, that ruling would have been exceptional. But it rested on the ground that attachment proceedings had no foundation outside of statutes, and must therefore in all things essential conform to them.

The statute concerning attachment proceedings in circuit courts differs from that relating to justices of the peace, by giving a form containing a summons clause, directing the sheriff to summon the defendant, if to be found within his county, or any county where he may have seized property, and the writ is to be tested and returnable like other writs. Except as possibly limited by some other statutory conditions, this does not differ from any other mesne process, and is a qualified summons.

The difference between the two classes of writs of attachment cannot be regarded as accidental. It is a radical difference in the exigency of the writ, which must have some effect given to it. And the statute expressly declares how personal service is to be made, which is only made after levy and inventory, and by service of a copy of that with the writ. When reference is afterwards made to giving judgment in case of personal service, it must mean the personal service just mentioned, made after property is levied upon.

The policy of the statute in regard to non-residents requires that they shall have a speedy hearing, and if actually summoned they have no delay beyond four days to keep them from going to trial. If an attachment can be made to serve the same end, it would be very easy to evade this, as the

Digitized by Google

affidavit need not state that any property is within the county, and the process might be grossly abused.

In our opinion the service on relator was a nullity, and she should have the relief prayed, and the suit should be dismissed.

The other Justices concurred.

---

68 454
71 213
68 454
77 395
77 491
68 454
80 319
68 454
98 550
68 454
s36NW 218
s13ASR 855
e183 141
68 454
135 181

MICHAEL MCNAMARA v. WILLIAM J. GARGETT.

[See *ante*, 303, 389.]

Bohemian oat note and bond—Construction of contract—Fraudulent representation—Public policy—Consideration.

1. Several instruments made at the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together, for the purpose of showing the *true* contract between the parties. *Sutton v. Beckwith*, 68 Mich. 303, 310.
2. A representation made by the payee in a promissory note, to the maker, that a so-called association, of which the payee claimed to be superintendent, was a corporation organized under the laws of this State, and in behalf of which he executed a bond or obligation, which formed the *real* consideration of the note, and without which it would not have been given, if *false*, will defeat a recovery by the payee upon the note, or by a purchaser before maturity with notice of such false representation before paying for the paper.
3. If a contract is at war with the established interests of society, and in conflict with the morals of the time, the fact that individuals may suffer by holding it void on the ground of public policy cannot affect the question, as the interests of individuals must in many cases be subservient to the public welfare.
4. If any part of the consideration of a contract is *illegal*, the *entire* consideration is *void*, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. *Snyder v. Willey*, 33 Mich. 496.

Digitized by Google

5. The "Bohemian oat note and bond," so called, are held to form the contract between the parties, and are construed together, as though written upon the same piece of paper, and as between the original parties, and those purchasing the note with notice of the bond, are held void. See *Sutton v. Beckwith*, 68 Mich. 303; *Mace v. Kennedy*, Id. 389.

Error to Gratiot. (Hart, J.) Argued January 24, 1888. Decided February 2, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

T. W. Whitney and *C. J. Willett*, for appellant.

James K. Wright (*George P. Stone* and *James L. Clark*, of counsel), for plaintiff.

LONG, J. Plaintiff brought suit in the circuit court for Gratiot county against the defendant, by declaration upon the common counts in assumpsit, with copy of note attached. The note reads as follows:

"$125.00. SUMNER, October 21, 1885.

"Fourteen months after date, I promise to pay A. A. Griffith or bearer one hundred and twenty-five dollars, value received, with interest at seven per cent. per annum.

"W. J. GARGETT."

The defendant pleaded the general issue, and gave notice—

"That the defendant above named, on the trial of this cause, will give in evidence, under the general issue above pleaded, and insist in his defense, that said note above set forth in plaintiff's declaration was given without consideration; that said note was a Bohemian oat note; that same was procured from defendant by deceit and fraud, and that the same was fraudulent, and void at its inception; that the consideration of said note was void, on the ground of public policy; that said note was obtained from the defendant for an illegal purpose by the payee named therein; that the consideration for which said note was given was an impossible consideration, and that could not legally be carried out

Digitized by Google

without a breach of the law, and by perpetrating a fraud," etc.

The cause came on for trial before the court without a jury, and the court made a finding of facts and law as follows:

"On October 21, 1885, the defendant, William J. Gargett, purchased of one A. A. Griffith 25 bushels of Bohemian oats, agreeing to pay therefor $10 a bushel, making a total of $250; for the payment of one-half of which sum he executed to said Griffith the promissory note in suit, of which the following is a copy:

"'$125.00. SUMNER, October 21, 1885.

"'Fourteen months after date I promise to pay A. A. Griffith or bearer one hundred and twenty-five dollars, value received, with interest at seven per cent. per annum. W. J. GARGETT,

"'Due December 24, 1886. P. O. Address, Elm Hall, Mich.'

"The oats were delivered, and with them an obligation, partly printed and partly written, which entered into and formed a part of the contract, and executed by said Griffith as superintendent, of which the following is a copy:

"'No. 340.

"'A BOND FROM THE LENAWEE, CLINTON, AND GRATIOT COUNTY BOHEMIAN OAT ASSOCIATION.

"'(*To be Signed by Our Superintendent, A. A. Griffith.*,

"'We hereby agree to sell 50 bushels of Bohemian oats at $10 per bushel for Mr. Wm. J. Gargett, of Sumner township, Gratiot county, State of Michigan, on or before the twenty-first day of October, 1886. Said W. J. Gargett is to pay the L., C., and G. Association 12½ per cent. for bonding said oats, if he sells them himself, or 25 per cent. for selling and bonding, in cash, upon presentation of the orders and bonds. And the first oats sold by this or any other association, or by the owner, or any one else, shall be applied to the redemption of this bond. A. A. GRIFFITH, Supt.'

"For feeding or consumptive purposes, the oats were not worth much more than ordinary oats; and the defendant knew they were not worth $10 a bushel, at the time of making the contract, for feeding purposes. He purchased them for the purpose of raising that kind of grain, and selling the whole or some portion again. He would not have made the purchase but for the bond or obligation above mentioned, and expected to pay the note if the association did as it

Digitized by Google

agreed to do, as expressed by the bond or obligation. The testimony does not show whether or not the oats were raised or furnished by Mr. Gargett with which to redeem the bond. But the grain mentioned in the bond never was sold or bonded by or for defendant.

"The evidence that there was such an association as above mentioned is found on the face of the bond or obligation. The parties selling the oats claimed that the association giving the bond or obligation was an incorporated company.

"Michael McNamara, the plaintiff, became the owner of the note by purchase about ten days after it was given, and long before its maturity; paying therefor its full face value. But at the time of the purchase he knew it was given for Bohemian oats, and knew of the nature of the contract that was made for which the note was given.

"The note and interest amounts to $142.50.

"Let a judgment be entered in favor of the plaintiff, and against the defendant, for the sum of $142.50.

"Also, let an order be entered staying execution, and that the defendant may have 20 days in which to remove this case to the Supreme Court. HENRY HART,

"Circuit Judge."

Judgment was entered in said court on the above findings on November 4, 1887, and the defendant brings error, and claims:

"1. That the findings of fact do not support the judgment.

"2. That the judgment should have been rendered for the defendant."

From the facts found by the court the plaintiff stands in no better position towards this note than the payee would have stood had he brought the suit in his own name. The court found that—

"Michael McNamara, the plaintiff, became the owner of the note by purchase about ten days after it was given, and long before its maturity; paying therefor its full face value. But at the time of the purchase he knew it was given for Bohemian oats, *and knew of the nature of the contract that was made for which the note was given.*"

We can construe the language of this finding in no other

Digitized by Google

light than that the plaintiff knew, before he paid his money on the purchase of this note, that the payee named in the note, at the time he obtained it from the defendant, made, executed, and delivered to the defendant the bond or writing set out in the findings; and that A. A. Griffith, the payee named, represented by such writing that he was the superintendent of the Lenawee, Clinton, and Gratiot County Bohemian Oat Association; and that Griffith, had by such writing agreed to sell for the defendant 50 bushels of Bohemian oats, at $10 per bushel, on or before October 21, 1886,—that is, two months before said note, by its terms, was to become due.

These two papers were made, executed, and delivered at the same time, and are to be construed together, in determining the contract between the parties. See *Sutton v. Beckwith, ante,* 310, and cases there cited.

The court also found that Griffith further represented that this Bohemian oat association was an incorporated company. All these representations the court finds were made known to the plaintiff before he purchased the note.

There is no statute in this State authorizing the incorporation of any such company, and the representation made by Griffith to the defendant that this so-called Bohemian oat association was an incorporated company was false, and known by this superintendent to be false at the time of procuring this note. It was a material representation, and one of the inducemen's to defendant to make his note and take this bond; and the court finds, from the evidence produced on the trial,—

"That the defendant would not have made the purchase but for the bond or obligation mentioned,"—

That is, the bond of a corporation which Griffith, the payee in the note, falsely induced the defendant to believe was an incorporated company; one which existed by authority of some act of the Legislature of this State. This fact would have defeated the recovery of the payee upon the note, and,

Digitized by Google

these facts all being known to the plaintiff before he paid a dollar for the note, must be held to defeat his recovery.

Is this contract also void on the ground of public policy? The defendant gave to Griffith $125 in money, and his note for $125, payable 14 months from date, with 7 per cent. interest, and received from said Griffith 25 bushels of Bohemian oats (which the court finds were worth not much more than ordinary oats), and an agreement in writing, signed by Griffith, promising to sell on or before one year from date 50 bushels of Bohemian oats for the defendant at $10 per bushel, and to receive upon such sale a commission of 25 per cent. if the company which Griffith represented made the sale, and 12½ per cent. commission if the defendant made the sale, or found the purchaser, at $10 dollars per bushel; and the court finds "that the defendant would not have made the purchase but for such bond or obligation."

The carrying out of this obligation on the part of Griffith meant the finding of another victim, within one year, who would take 50 bushels of Bohemian oats at $10 per bushel, upon the giving to him of a contract to sell for him, the next year after, 100 bushels at $10 per bushel, and so on *ad infinitum*, and increasing the number of bushels to be sold each year, in geometrical progression; and from this contract alone, on the tenth year, the enormous amount of the sale must be 25,600 bushels at $10 per bushel, if this contract is carried out. The Court cannot shut its eyes to the fact that this is only one of the thousands of similar contracts made within this State within the last few years, and that the unwary, unsuspecting, and too credulous farmers have been made the victims of sharpers and swindlers, who, by their seductive arts have worked upon the natural love of gain which most men possess, and thus reaped a rich harvest from those whom the law should protect. The very scheme itself bears evidence upon its face that it is a fraud and a snare, and yet so cunningly devised that, in the hands of a sharp

Digitized by Google

shrewd, and designing man, hundreds of the unwary have been defrauded; and the courts should set their seal of condemnation upon it, and pronounce it, as it is, a contract void on the ground of public policy. It is upon its face a gambling contract.

Mr. Greenhood, in his work on Public Policy, says:

"By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law. The strength of every contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at public expense; the courts will never, therefore, recognize any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare."

Walker, J., in *Hotzger v. Cleveland* (Marion superior court, Indiana), 3 Ind. Law Mag. 42, 50, speaking upon this question, says:

"We may take it as well settled that, in the law of contracts, the first business of the courts is to look to the welfare of the public; and, if the enforcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, even though it might result beneficially to the party who made and violated the agreement."

Mr. Story says:

"Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free from definition in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy." Story, Cont. § 675.

Some of the courts, speaking upon this subject, have said that the immediate representatives of the people in legisla-

Digitized by Google

ture assembled would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses; that legislation is least objectionable, because it operates prospectively, as a guide in future negotiations, and does not, like a judgment of a court, annul a contract already concluded.

Such contracts in this State have already had the seal of condemnation stamped upon them by the legislative branch of the State government by Act No. 20, Laws of 1887, being—

"An act to prevent the taking of bonds, promissory notes, and other evidences of indebtedness, in whole or part consideration of bonds, contracts, and other agreements for the sale of grain, seeds, and other cereals at a *fictitious* price, and to prevent the sale and transfer of such evidences of indebtedness, and to provide a punishment therefor."

This act may at least be taken as an exponent of public disapproval of all such contracts.

The argument that holding such contracts void on the ground of public policy annuls a contract already concluded has no force. If the contract is at war with the established interests of society, and is in conflict with the morals of the time, the fact that individuals may suffer can in no manner affect the question, as the interests of individuals must in many cases be subservient to public welfare. It is essentially a gambling contract, and one impossible to be performed. The contract is that Griffith shall sell for Mr. Gargett 50 bushels of his (Gargett's) Bohemian oats, at $10 per bushel, on or before October 21, 1886. No man can, in legal contemplation, force the sale of another's property by a given day, or by any day, by his own act. *Stevens v. Coon*, 1 Pin. (Wis.) 357.

These oats were worth no more than any other oats, for any useful purpose, and Griffith knew that these oats, at any time up to October 21, 1886, could not be sold legitimately

Digitized by Google

for more than any other oats, and that they could not be sold for $10 per bushel in any legitimate and lawful transaction; that the only way in which they could be so sold was by the perpetration of another and similar fraud upon some other unsuspecting victim to his arts and wiles. The contract is one that Gargett could not have enforced, had Griffith failed to call for and sell the oats. In such cases the courts must leave the parties where it finds them. If either party has, however, been defrauded, he may have his action for the fraud, but could not enforce the contract.

It is said, however, that Gargett received 25 bushels of oats, and ought not to be permitted to complain, as there is not a total failure of consideration. But the trouble is, the whole contract is tainted and avoided by the part of the consideration which is illegal. If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. 1 Pars. Cont. 457; *Snyder v. Willey*, 33 Mich. 496.

Had the note gone into the hands of a *bona fide* holder,—one who purchased for value before maturity, and without notice of the consideration for which it was given,—the principles which we have laid down would not apply. It is not intended to run counter to the rules of the law merchant governing negotiable instruments, but we have taken the note and bond together as forming the contract between the parties; and construing them together, as though written upon the same piece of paper, and as between the original parties and those purchasing with notice, we hold such contracts void.

The judgment of the court below must be set aside, and judgment entered in this Court in favor of defendant, with costs of both courts.

The other Justices concurred.

Digitized by Google

68 463
103 426
68 463
113 446

JONATHAN W. COBBS AND WILLIAM W. MITCHELL v. THE FIRE ASSOCIATION OF PHILADELPHIA.

[See *post*, 465.]

Waiver—Proof to establish—Submission to jury.

1. Waiver may be proved indirectly, by circumstances, as well as by direct testimony; and whether made out or not is a question for the jury.
2. A party always has the option to waive a condition or stipulation made in his favor, and such waiver is not repugnant to the written agreement, because it would only be the exercise of an option which the agreement left it in the power of the party to make, the exercise or non-exercise of which option is a *fact* provable by *parol* as well as by *written* evidence.

Error to Wexford. (Fallass, J.) Argued January 24, 1888. Decided February 2, 1888.

Assumpsit. Defendant brings error. Affirmed. The facts are sufficiently stated in the opinion.

Norris & Norris, for appellant.

Blair, Kingsley & Kleinhans, for plaintiffs.

CHAMPLIN, J. The action in this case is assumpsit upon a policy of insurance, which was issued upon the same property as that covered by a policy issued by the North British & Mercantile Insurance Company, and which came before this Court for consideration in the case of *Marthinson v. North British & Mercantile Insurance Co.*, 64 Mich. 372 (31 N. W. Rep. 291). The same defense is interposed in this case as was in that, and the testimony in this case tends more strongly to prove a waiver of the defense of forfeiture

Digitized by Google

of the policy than appeared in the record in the *Marthinson Case.*

A waiver may be proved indirectly, by circumstances, as well as by direct testimony; and whether a waiver is made out or not is a question for the jury.

A party always has the option to waive a condition or stipulation made in his own favor, and such waiver is not repugnant to the written agreement, because it would only be the exercise of an option which the agreement left it in the power of the party to make. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing.

There is no antagonism upon the subject of waiver between the decisions of this Court and those of the Supreme Court of the United States. *Miller v. Insurance Co.,* 12 Wall. 285; *Insurance Co. v. Warehouse Co.,* 93 U. S. 527, 546; *Insurance Co. v. Norton,* 96 Id. 234. We commend these cases, and especially the last cited, to the careful perusal of counsel who presented this case for defendant.

The question of waiver was properly submitted to the jury under the testimony, and the jury have found in favor of the plaintiffs, and the judgment is affirmed.

The other Justices concurred.

Digitized by Google

68 463
71 421
68 465
88 89
68 465
91 226
68 465
109 676
68 465
110 67
68 465
113 446
68 465
s36NW 788
130 567

JONATHAN W. COBBS AND WILLIAM W. MITCHELL v. THE FIRE ASSOCIATION OF PHILADELPHIA.

[See *ante*, 463.]

Waiver—Submission to jury—Question of law—Rehearing.

1. Where the *fact* of waiver is sought to be established by circumstances, or inferred from facts proved, or where the testimony is doubtful or conflicting, it is a question for the jury.
2. Where there is no conflicting testimony, and all the facts and circumstances are admitted or conceded, it is the province of the court to inform the jury, as matter of law, whether a waiver has been established or not.
3. "Upon a careful review of the whole record, we are satisfied that a rehearing ought not to change the result reached in the disposition of the case, and, taking this occasion to correct the error in the opinion pointed out, the rehearing is denied."

Motion for rehearing. Submitted February 14, 1888. Denied March 2, 1888. The facts are stated in the opinion.

Norris & Norris, for motion.

Blair, Kingsley & Kleinhans, contra.

CHAMPLIN, J. A motion for a rehearing was made in this case for the reason that in the opinion handed down it was stated:

"Whether a waiver is made out or not is a question for the jury. * * * The question of waiver was properly submitted to the jury under the testimony;"—

While the record shows that no question of waiver was submitted to the jury. What the opinion states is that—

"A waiver may be proved indirectly, by circumstances, as well as by direct testimony; and whether a waiver is made out or not is a question for the jury."

Digitized by Google

The opinion is erroneous in stating that the question of waiver was submitted to the jury; and, if it ought to have been submitted, under the facts in the case, the rehearing should be granted.

The general rule was stated in the opinion filed, when the fact of waiver is sought to be established by circumstances, or inferred from facts proved, or where the testimony is doubtful or conflicting. But where there is no conflicting testimony, and all the facts and circumstances are admitted or conceded, it is the province of the court to inform the jury, as matter of law, whether a waiver has been established or not. *Insurance Co. v. Evans*, 9 Md. 20; *Titus v. Insurance Co.*, 81 N. Y. 419; *Gans v. Insurance Co.*, 43 Wis. 108; *Marthinson v. Insurance Co.*, 64 Mich. 372 (31 N. W. Rep. 291).

Upon the trial of this case, after the plaintiffs had rested, the record shows that the counsel for defendant addressed the court as follows:

"If your honor please, this case, as the court has already seen, turns almost directly upon the charges of the court. Our theory of the case is that it will be the duty of the court, under the facts, to dispose of it one way or the other. If there is any question to go to the jury, it will be determined, of course, under instructions, the question of how much they should be allowed for this loss. I can conceive of no other question about which there would be any dispute on the facts."

After the testimony was closed, counsel for defendant requested the court to instruct the jury as follows:

"7. There has been no evidence of the defendant's acts and statements prior to the fire, July 29, 1884, given you in this cause, which in law would amount to a waiver of the terms and conditions of the policy contract in suit, or which would estop the defendant from relying on such terms and conditions in its defense.

"8. There has been no evidence of the defendant's acts and statements since the fire, July 29, 1884, which in law would amount to a waiver of the terms and conditions of the

Digitized by Google

policy contract in suit, or which would estop the defendant from relying on such terms and conditions in its defense."

It is quite evident, therefore, that, in the view which counsel for defendant took of the testimony in the case, it presented simply and purely a question of law for the court to pass upon. We think this view of the counsel is correct. The testimony bearing upon the question of waiver was not disputed. It consisted largely of written correspondence, and what was done in consequence thereof in the way of preparing and forwarding proofs of loss, and in meeting defendant's agent for the purpose of settling the same, by defendant's request. The court, however, did not take the same view which counsel for defendant did of the legal effect of such testimony, but held in effect that the undisputed testimony in the case established as matter of law a waiver by defendant of the forfeitures of the policy relied on by defendant, and in this we think the circuit judge was right. He complied with the suggestion of defendant's counsel, and submitted to the jury the question as to how much should be allowed for the loss.

Upon a careful review of the whole record, we are satisfied that a rehearing ought not to change the result reached in the disposition of the case, and, taking this occasion to correct the error in the opinion pointed out, the rehearing is denied.

The other Justices concurred.

Digitized by Google

THE PEOPLE v. EDWARD O'BRIEN, JR.

[See 60 Mich. 8.]

Criminal law—Bill of exceptions—Evidence—Admissions and statements of respondent—Failure to swear witness—Argument of counsel—Credibility of witness.

1. The record, as made in the court below, cannot be amended at the hearing upon a writ of error and bill of exceptions, but must be taken as settled by the circuit judge, unless some proceedings are taken before hearing to amend it.
2. The admissions or declarations of an accused party, when voluntarily made, are *competent* evidence against him; but the statements of another are purely hearsay, unless made under such circumstances, in the presence and hearing of the accused, that his acquiescence in such statements can be plainly inferred from his demeanor or conduct.
3. It is error to allow a prosecuting attorney to comment unfavorably to the jury upon the failure of the respondent to swear a witness whose alleged statements, as sworn to by a witness for the people, were *improperly* received in evidence.
4. In a criminal case it is presumed that *all* of the evidence relating to the subject-matter of the exceptions is in the record; and the Court is bound by the record as presented, and cannot go outside of it to guess that there was *other* evidence given on the trial, qualifying the testimony contained in the bill of exceptions.
5. If the jury are satisfied that a witness has testified truthfully in any portion of his testimony, they are permitted to receive and act upon it, although satisfied that other portions are false, or that he has spoken differently out of court, and has a bad reputation for veracity among his neighbors. Such testimony is to be regarded with suspicion, and closely scanned and considered; but, if believed by the jury to be true, it is entitled to the same weight as if coming from any other source.

Exceptions before judgment from Allegan. (Arnold, J.) Argued January 26, 1888. Decided February 2, 1888.

Respondent was convicted of malicious trespass. Verdict

Digitized by Google

set aside and new trial granted. The facts are stated in the opinion.

Pope & Hart, for respondent.

C. R. Wilkes, prosecuting attorney, for the People.

MORSE, J. The respondent has been twice convicted of a willful trespass upon the improved lands of Levi and Charles H. Loomis, and destroying grain growing thereon, under section 9174, How. Stat.

The case as it appeared in this Court the first time will be found reported in 60 Mich. 8 (26 N. W. Rep. 795).

We do not consider it necessary to discuss the objections raised upon the second trial, and now urged here again, that were by us decided and disposed of when the case was here before. The objections to the complaint and warrant, as to the description of the premises and the kind of grain destroyed not being specifically set out, comes, as then said, too late. Nor do we consider that the defendant could have been harmed on the second trial by the insufficiency of the description. He must have been informed fully upon the first trial of the exact location of the premises, and the kind of grain that he was accused of destroying. The only object of a specific identification of the land and the grain in the complaint and warrant would be to apprise him of the particular offense with which he was charged. There was not, on the last trial, the same urgent reason for this specification which existed at the first. There is, therefore, no better reason for quashing the complaint and warrant now than there was when the case was first here.

But respondent's counsel claim that they established, before the beginning of the last trial, by affidavits before the circuit court, which affidavits are made a part of the bill of exceptions, that they did in fact raise these objections, and move to quash therefor, before the first trial of the cause;

Digitized by Google

and that the showing by their affidavits entitle them to raise the point here.

It, however, appears in the record that the circuit judge refused to amend the record, so that it would show the making of this motion, upon the express ground that no such motion had ever been made. If the motion was made, as claimed by these affidavits, it must have been made before this same circuit judge. We cannot amend the record as made by the circuit court, at the hearing upon a writ of error and bill of exceptions. We must take the record as settled by the circuit judge, unless some proceedings are taken before hearing to amend it.

The clerical error discovered in the warrant, since the last trial, cannot avail the defendant now. The word "there" left out of the warrant in relation to the "growing and being" of the grain on the land, is found in its proper place in the complaint. It was a mere clerical omission, and corrected itself in the reading, but, if of any consequence, should have been objected to before the first trial of the cause.

The case against the respondent rested almost entirely upon the testimony of Theobald Miller, who claimed that he and the accused committed the trespass; that he took part in it at the request of the respondent; that they stayed that night at the house of O'Brien's father, he and the accused sleeping together. He testified that he and the respondent got up about 2 o'clock A. M., and put on rubbers, and went to the wheat field of the Loomises, and cut down and destroyed some standing wheat growing upon the premises, and committed other depredations. He further gave evidence that during the day before the trespass was committed the respondent said to him,—

"Will you stay here to-night, and tell your wife you are to stay here so as to pick squash-bugs early in the morning before they fly? And we will tell Cobb that you are to stay so as to pick bugs early in the morning."

Digitized by Google

He was permitted to further testify, against objection, that the morning after the trespass, while they were picking squash-bugs at O'Brien's, the old man O'Brien, father of the respondent, said to Cobb in the presence of respondent:

"If Mr. Loomis had any depredations committed last night we know that Eddie [respondent] and Miller did not do it, because they both stayed at our house all night."

Cobb was then called by the people, and testified that the respondent told him the night before that Miller was going to stay there that night to pick squash-bugs; and that old man O'Brien, the next morning, while they were at work, said, in the presence of Miller, respondent, and himself, that Eddie and Miller had both staid there at his house that night, and he knew that they did not do it,—speaking of the trespass committed upon the premises of Loomis. This statement of the old gentleman was objected to as immaterial, as the respondent could not be convicted upon the statements of his father. The evidence was, however, admitted and retained in the case.

The respondent made a statement in his own behalf, not being sworn. He said he had no knowledge of the depredations; that he staid at home that night, and did not commit the trespasses, and was not with Miller when they were committed; and denied the testimony of Miller relative to the matter. The testimony is not all set out in the record, and it does not appear whether or not he gave any evidence as to Miller staying at his father's house that night, or that he said anything about the remark his father was alleged to have made in the morning while picking bugs.

In connection with this evidence as to the old man's statement to Cobb, and the fact of Miller's testimony that he stayed at O'Brien's that night, the prosecuting attorney, in his address to the jury, to use the language of the record,—

"Asked the jury to consider the fact that the respondent's father and mother were not sworn for the respondent as wit-

Digitized by Google

nesses, as being a circumstance tending to show the guilt of respondent."

These remarks were objected to by respondent's counsel as being immaterial and irrelevant and not a proper subject of comment to the jury; and he requested the court to forbid the prosecuting attorney commenting upon the fact that the respondent's father and mother were not sworn as witnesses in his behalf.

The court ruled that the failure of the respondent to place his father upon the stand to testify in his behalf, if he had knowledge of facts material to the defense claimed by respondent, was a legitimate subject of comment by the prosecuting attorney to the jury, respondent's father having been in the court-room and in attendance upon the trial during the whole thereof. The court further directed the prosecutor to refrain from commenting upon the fact that respondent's mother was not produced as a witness in his behalf, and further said to the jury that any statement or argument of the prosecuting attorney as to the failure of the respondent to produce his mother as a witness in his behalf could not be considered by them, nor could the fact that she was not so sworn be considered by them.

The respondent's counsel also requested the court to instruct the jury in this behalf that—

"The jury are not to draw any inference unfavorable to the respondent from the fact that the father of respondent was not sworn in his behalf, nor that the respondent's mother was not sworn."

This request was not given by the circuit judge, nor was any reference made to the subject in his general charge.

If the evidence of what respondent's father said the morning after the trespass ought not to have been admitted against the respondent, then any argument, based upon the fact of the old gentleman not being called as a witness, was grave error. Under the facts of the case there was nothing that

Digitized by Google

he could have testified to that would have aided the accused or thrown any light upon the case, save a denial that he made any such statement as testified to by Miller and Cobb, or that Miller did not stay at his house that night. But if Miller did stay there, and his story was true, neither the respondent's father nor mother could have disputed it.

Miller claimed that he and the respondent went to bed, and started out about 2 o'clock in the morning. In all probability neither the father nor mother of the respondent could have testified truthfully that they knew their son did not leave his bed, or the house, long enough to be engaged in this trespass. It does not appear from the record that any testimony was given on the part of the respondent controverting the fact of Miller's staying at the house of O'Brien that night. The respondent's statement, as given in the record, does not deny it. The record contains this statement at the conclusion of the evidence:

"The foregoing is not all the testimony given in the case, either on the part of the people or of the respondent."

But we cannot presume anything against the respondent. In a criminal case we are bound to presume that all the evidence relating to the subject-matter of the exceptions is in the record. At least, we are bound by the record presented here, and cannot go outside of it to guess that there was other evidence given on the trial, qualifying the testimony contained in the bill of exceptions.

I do not think the statement made by O'Brien, senior, was admissible against the respondent.

The admissions or declarations of an accused party, when voluntarily made, are competent; but the statements of another are purely hearsay, unless made under such circumstances, in the presence and hearing of the accused, that his acquiescence in such statements can be plainly inferred from his demeanor or conduct.

Digitized by Google

The correct rule, I think, is stated by Mr. Greenleaf in his work on Evidence, volume 1, § 197:

"Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party; and, whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood, by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated."

The record states that this remark of the father was made in the presence of the respondent, but there is nothing to show that he heard it, or paid any attention to it. There are no circumstances shown that lead to any inference that he heard and understood it, except that the four men were in the same field or lot, picking squash-bugs. It is not probable that any two of them were picking bugs from the same hill of vines, and, for all that the record discloses, the respondent might have been so far away, or of such defective hearing, that the remark did not reach him.

If Miller did stay at the house of O'Brien that night, there was, if respondent heard and understood the statement of his father, no call or occasion for him to speak, if he was innocent. The remark was to the effect that the accused was not guilty of the trespass, and the respondent would not naturally dispute his father, and say that he did commit the depredations, whether he was guilty or innocent of the offense. There was naturally no reason for anything but silence on the part of the accused; nor would this silence have any tendency to corroborate the story of Miller that he stayed there, even if that fact had been denied by the respondent upon the trial. If Miller had not stayed there, the respondent would not be likely, if innocent of the crime, to dispute his father upon a matter in such case so immaterial as the fact of where Miller

Digitized by Google

might have slept that night, because, if the respondent was innocent, he would be presumably ignorant of any complicity of Miller in the trespass, and it would not seem important to him where Miller stayed that night.

It seems to me that in no event could any legitimate inference be drawn against the respondent because of his silence on the occasion, as testified to by Cobb and Miller. The introduction and retaining of this evidence in the case was error, and the remarks of the prosecutor and the court to the jury, as to the failure of the respondent to swear his father as a witness, must have been based upon this testimony erroneously in the case. The whole proceeding in this respect was harmful and prejudicial to the rights of the accused.

There was no error in permitting Mrs. Miller to testify that her husband did not stay at home the night of the trespass. This was a fact having some weight in corroboration of the statements of Miller as to his whereabouts, and was admissible.

Five witnesses were sworn on the part of the defendant, and testified that the general reputation of Miller was bad for truth and veracity. No person sustained his reputation.

The court was requested to charge the jury that, if they believed the testimony of these witnesses, Miller was unworthy of credit, and they ought not to convict respondent on his testimony.

The court refused this request, and instructed the jury as follows:

"The evidence given in this case with reference to statements made by the witness Miller out of court, which it is claimed are inconsistent with or contradictory to his statements made under oath, as well as his admissions upon cross-examination, or statements made by him tending to contradict his testimony, are admissible for the purpose of impeaching his testimony upon the stand; the testimony of five witnesses with reference to the general reputation of

Digitized by Google

Miller for truth and veracity was also admissible to impeach this witness.

"Now, all this testimony is for your consideration; its office is to assist the jury in correctly judging of the credit due the testimony of the witness so sought to be impeached, and whether his sworn statements in whole or in part are true. If this witness' character for truth and veracity is so bad that he is unworthy of belief, and you so believe from the evidence, you ought not to credit him; but if, notwithstanding any and all testimony introduced to impeach him, in view of all the evidence in the case, you are satisfied he has told the truth with reference to the respondent's connection with the transaction constituting the offense charged, you are at liberty to act upon his testimony, and give it such credit as you believe it entitled to."

The law was correctly stated by the court, and the request properly refused. One who has generally a reputation as a liar, may, and often does, tell the truth. The truth is always the truth, no matter from what source it may come; and if the jury are satisfied that a witness has given the truth in any portion of his testimony, they are permitted to receive and act upon it, though they are satisfied that other portions of his testimony are false, or that he has spoken differently out of court, and has a bad reputation for veracity among his neighbors generally. The testimony of such a man is to be regarded with suspicion, and closely scanned and considered, but, if believed by the jury, under all the other facts and circumstances in the case, to be true, it is entitled then to the same weight as the truth would have, coming from any other source.

For the errors noted the respondent must be granted a new trial, and the verdict of the jury in the court below vacated and set aside.

The other Justices concurred.

Digitized by Google

THE PEOPLE v. CHRISTIAN HUX.

68 477
139 627

Criminal law—Justices of the peace—Adjournment—Return to circuit court.

1. The return of a justice of the peace to an appeal in a criminal case, that the respondent was present when the verdict was rendered, is conclusive.
2. An adjournment of the trial of a criminal case for more than one week, on the application of the respondent and by consent of the prosecuting attorney, will not oust the justice of jurisdiction.

Error to Shiawassee. (Newton, J.) Argued January 26, 1888. Decided February 2, 1888.

Respondent was convicted of furnishing spirituous liquor to an intoxicated person. Conviction affirmed. The facts are stated in the opinion.

Willard J. Turner (*Jerome W. Turner*, of counsel), for respondent.

Moses Taggart, Attorney General, and *S. F. Smith*, prosecuting attorney, for the People.

LONG, J. The proceedings in this case were commenced in justice's court, in which the respondent was charged, under section 2271, How. Stat., with having sold and furnished to one Henry L. Brayton, certain spirituous and intoxicating liquors, he, the said Henry L. Brayton, being then and there an intoxicated person, etc.

Warrant was issued on the eighth day of July, 1887, and respondent apprehended and brought before the court on that day. The charges in the warrant were read to him by the court, and respondent pleaded not guilty. Respondent then moved the court for an adjournment, and stated to the

Digitized by Google

court that he was compelled to be absent on business for a week, and could not be present for trial within six days, and on motion of respondent, the prosecuting attorney of the county consenting thereto, the cause was adjourned to the eighteenth day of July, 1887, at 10 o'clock, A. M.; the respondent entering into a recognizance in the sum of $100, with sureties, for his appearance on that day.

On the eighteenth day of July, 1887, respondent appeared before the court with his attorney, W. J. Turner, and asked leave to withdraw his plea, which motion was granted, and then moved the court that he be discharged, on the ground that the justice had lost jurisdiction by reason of the adjournment being for more than one week. The court overruled the motion, and the cause proceeded to trial on that day before a jury, who found the respondent guilty as charged, and the court adjudged him to pay a fine of $50 and costs of prosecution (ascertained by the court at $17.91), within six hours, and in default of such payment to be imprisoned in the common jail of Shiawassee county for the period of 60 days.

The cause was removed to the circuit court for the county of Shiawassee by *certiorari*, the grounds of error alleged in the affidavit for such writ being—

"1. That he, the said justice, erred in overruling the motion of defendant's attorney, that he had no jurisdiction in said cause.

"2. That the said justice erred in overruling the motion of defendant's attorney in arrest of judgment on the ground that said defendant was not present at the time said jury rendered the verdict of guilty."

On the hearing in the circuit court, before his honor, Judge Newton, the conviction was affirmed, and the respondent brings the case to this Court by writ of error.

An examination of the record shows that the error assigned upon the ruling of the justice, upon the question that the respondent was not present at the time the jury rendered their verdict of guilty, is not sustained by the facts. The

Digitized by Google

return shows that the respondent was present at that time, and such return is conclusive. *Rawson v. McElvaine*, 49 Mich. 194 (13 N. W. Rep. 513); *People v. Hobson*, 48 Id. 28 (11 N. W. Rep. 771); *Young v. Kelsey*, 46 Id. 414 (9 N. W. Rep. 453); *Galloway v. Corbitt*, 52 Id. 460 (18 N. W. Rep. 218).

The only question for our consideration is whether, by the adjournment of the cause on the application of the respondent, and by consent of the prosecuting attorney, from the eighth to the eighteenth day of July, the justice lost jurisdiction.

How. Stat. § 7094, provides that—

"The justice shall proceed to hear, try, and determine the cause within one week after the return of the same [the warrant], unless the absence of witnesses from the county, * * * or the sickness of witnesses or of the accused, shall render a continuance of such cause necessary; in which case it shall and may be competent for the justice to adjourn or continue the same for such time as may be necessary to secure the ends of justice, not exceeding thirty days in all."

In *People v. Shufelt*, 61 Mich. 237 (28 N. W. Rep. 79), this Court held that an adjournment of that case before the justice beyond one week, on the ground that the prosecuting attorney of the county was sick, and unable to proceed with the trial, though not one of the causes especially enumerated in the statute, did not deprive the justice of jurisdiction. In this case the respondent himself makes application for the adjournment, and, the prosecuting attorney consenting, the cause is adjourned 10 days. Any adjournment of the cause for one of the causes enumerated in the statute, or "to secure the ends of justice," not exceeding 30 days in all, would not oust the justice of jurisdiction; and where the respondent makes the application and procures the adjournment himself, and the prosecuting attorney consents to such adjournment, the respondent will not be heard to complain where the adjournment is for a less period than 30 days, for what could have

Digitized by Google

been done on motion and showing can always be done by consent.

The judgment is affirmed.

The other Justices concurred.

68 480
s36NW 231
188 s466

THE PEOPLE v. WILLIAM MCLEAN.

Criminal law—Resisting officer—Information—Arrest—Warrant—Misdemeanor.

1. An allegation in an information that a warrant "was issued by a justice of the peace," is not tantamount to averring that "it was issued by lawful authority."
2. The arrest of a person for a misdemeanor, after the commission of the act, cannot be made without a proper warrant.
3. In cases of misdemeanors, the sheriff must be present either in sight or hearing, directing the arrest, to justify a person *not* armed with a warrant to make the arrest.

Error to Mackinac. (Steere, J.) Argued January 26, 1888. Decided February 2, 1888.

Respondent was convicted of the offense of resisting an officer, and sentenced to State prison for two years. Judgment reversed and prisoner discharged. The facts are stated in the opinion.

James J. Brown, for respondent.

Moses Taggart, Attorney General, and *Henry Hoffman*, prosecuting attorney, for the people.

CHAMPLIN, J. McLean was convicted in the circuit court for the county of Mackinac, for resisting an officer in attempting to serve a warrant upon him, and was sentenced to be imprisoned two years in the State prison.

Digitized by Google

The statute (How. Stat. § 9257) enacts:

"If any person shall knowingly and willfully obstruct, resist, or oppose any sheriff, * * * or other officer or person duly authorized, in serving or attempting to serve or execute any process, * * * issued by lawful authority, * * * every person so offending shall, on conviction thereof, be punished," etc.

The information sets out that respondent—

"Did knowingly and willfully obstruct, resist, assault, and oppose one Peter A. Paquin, an under-sheriff in and for said county of Mackinac, in his, said Peter A. Paquin's, serving and attempting to serve a warrant for the arrest of William McLean, he, said William McLean, being charged in said warrant with the offense of assault and battery, said warrant being issued by Robert Rutherford, a justice of the peace in and for the city of St. Ignace, against the form of the statute in such case made and provided, and against the peace and dignity of the people," etc.

The information was objected to upon the trial, for the reason that it does not appear therefrom that the warrant was issued by lawful authority, and that the allegation that it was issued by Robert Rutherford, a justice of the peace, is not equivalent to the words of the statute defining the offense.

There are two things which are necessary to justify an arrest upon a warrant:

1. A warrant good upon its face.
2. An authority in the person who undertakes to act under it. *Drennan v. People*, 10 Mich. 183.

A justice of the peace has no lawful authority to issue a warrant to arrest a person unless upon the complaint on oath of some person showing that an offense has been committed, and that there is reasonable ground to believe that the accused committed the offense. The allegation in the statute, "made or issued by lawful authority," includes the jurisdictional facts and steps which authorize the person or body who makes the order or issues the warrant to act. It is true that

Digitized by Google

no officer is bound to look behind a warrant good on its face, issued by an officer who *prima facie* has a right to issue warrants.

In statutory offenses, every essential element of the crime as defined by the statute must be averred in the information, either in the words of the statute, or in language substantially equivalent. *Hall v. People*, 43 Mich. 417 (5 N. W. Rep. 449); *People v. Husted*, 52 Id. 624 (18 N. W. Rep. 388.)

If we go back into the history of officers known as justices of the peace, we shall find that originally they were not authorized to issue warrants for the apprehension of offenders. They were first instituted in England in 1326, and their duties were described in the most general terms. By 1 Edw. III. *c.* 16, they "were assigned to keep the peace;" and by 34 Edw. III. *c.* 1, they were empowered "to take and arrest all those that they may find by indictment or suspicion, and put them in prison." This was in 1360. But neither in these or in any earlier statutes is there any authority conferred upon them to take an information as to the commission of a crime, and issue a summons or warrant for the apprehension of the suspected person. 1 Steph. Hist. Crim. Law, 190.

The same learned author states that the statutes above quoted gave them no other authority for the apprehension of offenders than was by the common law inherent in every constable, and indeed in every private person. The practice of issuing warrants by justices of the peace came into use by degrees. But their authority to do so was disputed for centuries, and the subject formed a bone of contention between those eminent jurists, Coke and Hale, the former maintaining against such authority and the latter in favor. The granting of warrants, although recognized by various statutes, was not finally set upon an indispensable statutory foundation in England until the enactment of 11 and 12 Vict. *c.* 42, in 1848.

The authority of justices of the peace in this State must

Digitized by Google

be found in the Constitution and statutes enacted thereunder, and, as before stated, they can only issue a warrant upon a complaint on oath. To allege, therefore, in the information, that a warrant was issued by a justice of the peace, is not tatamount to averring that it was issued by lawful authority; for the authority is not and never was inherent in the officer, but is conferred under the statute by virtue of the complaint under oath.

It appears from the testimony returned in the bill of exceptions that on the night of the twenty-third of August, 1887, L. J. Monteith was sheriff of Mackinac county, and Peter A. Paquin was under-sheriff; that about 10 o'clock in the evening of that day, Justice Rutherford handed the sheriff a warrant for assault and battery against McLean in front of Rutherford's office; that Peter A. Paquin was then present, and the sheriff told him to get into a hack, and go up to what was known as "Red Annie's," a house of ill fame, by the road, and arrest McLean if he found him there; that he would take another direction by the railroad track, and go to another house of ill fame, and search for McLean there; that the sheriff had the warrant with him, and that Paquin had no warrant; that these houses of ill fame were about 80 rods apart; that he and the under-sheriff separated, the sheriff going up the railroad track, and the under-sheriff going in a hack in another direction.

Paquin arrived at "Red Annie's," found the door open, and a number of persons in the room. He saw McLean in there, and went in, and laid his hand on McLean's shoulder, and said:

"McLean, I want you. I have got a warrant for you; you are my prisoner."

McLean then pulled a revolver from his right-hand coat pocket, and pointed it at Paquin's head, and said:

"Get out, you — — —, or I will blow your brains out."

Paquin did not know whether the revolver was cocked or

Digitized by Google

loaded, but he backed out of the door, McLean following him with the revolver, pointed at him, saying:

"Get out; get out; get out of the house, or I will kill you."

About five minutes after he got out he heard the report of a revolver, but who fired it he did not know. He started to find the sheriff, and met him coming a short distance from the house. He did not tell McLean that he was an officer, and had no uniform or badge of office on. He had no personal acquaintance with McLean, and had never talked with him before that night. He did not know at the time he attempted to make the arrest where the sheriff was, only the sheriff had told him where he was going.

Upon this testimony, counsel for prisoner requested the court to instruct the jury as follows:

"If you find that under-sheriff Paquin had no warrant with him at the time he attempted to arrest the prisoner, and that the sheriff had the warrant, but was not with the under-sheriff at the time of the arrest, you must acquit him."

Upon the subject of this request the court instructed the jury as follows:

"As to the second point in the case,—that is, the legal authority of the officer to make the arrest,—you are instructed in the first place that, when a man is charged with a misdemeanor as this party was,—assault and battery,—if it is not committed in the presence of the officer, the officer cannot make the arrest without a warrant. But in this case it appears undisputed that the warrant was issued by Justice Rutherford, charging the defendant with assault and battery. That warrant is in evidence, and you are instructed that any officer making an arrest under that warrant would be authorized by law, and the party resisting him would be guilty of the offense charged.

"Now, as to the condition of the parties at the time of the arrest, and what occurred, you have the questions of fact in dispute before you to decide. In the first place, you are instructed that the under-sheriff would only have authority to make the arrest under that warrant, and if he undertook

Digitized by Google

to go on his own responsibility, without this warrant and without knowing where it was, and without any direction from the officer who had it in his possession, he could not justify under that, simply on the ground that he knew such warrant had been issued; but if, on the other hand, at the time the warrant was issued, the under-sheriff was with the sheriff, and was acquainted with that fact, and the sheriff then called upon him to assist him in making the arrest, and they started out together for that common purpose, and after acting in concert the under-sheriff went to the house where he was directed to go by the sheriff, to attempt to make the arrest, and the sheriff himself was at the same time engaged upon the same enterprise, even though the warrant was not in the hands of the under-sheriff, if he was acting under the directions of his superior, and knew where he was, that he was engaged in the same enterprise and within reach, he would be justified in making the arrest, even though the sheriff was some distance away with the warrant in his possession."

The question whether an arrest can be made without warrant has been decided from time to time according to the various circumstances of each particular case, many of which may be found in 2 Hale, P. C. 72–105. The principles recognized in the cases are:

1. Any person may arrest another who is actually committing, or has actually committed, a felony.

2. He may arrest any person whom he suspects on reasonable grounds to have committed a felony, if one has actually been committed.

3. Any constable or sheriff may arrest any person whom he suspects, on reasonable grounds, of having committed a felony, whether in fact a felony has been actually committed or not.

The common law never allowed the arrest of persons, who were either guilty of or suspected of having committed misdemeanors, without a warrant issued by lawful authority, except in cases of an actual breach of the peace committed in the presence of the officer, while the person was taken in the act, or immediately after its commission. This exception was made, not to bring the offender to justice, but in order

Digitized by Google

to preserve the peace, which by the common law was regarded as of the utmost consequence.

McLean was charged simply with a misdemeanor, and he could not be arrested for the crime after the commission of the act, without a proper warrant.

The warrant was issued and delivered to the sheriff. The sheriff is authorized to take such assistance with him in making an arrest as he may deem necessary, and the warrant in his possession while present and pursuing his object will be a justification to his assistants in making the arrest. But he has no authority to send an under-sheriff or deputy to one place to make an arrest without a warrant, while he goes to another for the same purpose with the warrant. He cannot send his deputy into one town or county while he gives pursuit in another. Under the ancient practice of hue and cry, before warrants were issued, this might be done in the pursuit of felons, but no hue and cry could be raised for a misdemeanor.

We think it clear that in cases of misdemeanors the sheriff must be present either in sight or hearing, directing the arrest, to justify a person not armed with the warrant to make the arrest. Such was not the case here.

The under-sheriff had no warrant in his possession when he attempted to arrest McLean, and although acting under the orders of the sheriff, given before they separated, to search different places, the sheriff was not in such proximity, nor did he have such immediate control of the action of the under-sheriff, as justified the court or jury in saying that the warrant was in the possession or control of the under-sheriff, or that it conferred upon him any authority to make the arrest. A warrant for a misdemeanor cannot lawfully be held by two officers at once, when they are not together. The case is fully covered in the opinion of Mr. Justice CAMPBELL in *Drennan v. People*, 10 Mich. 184 *et seq.* Upon this point there was no disagreement between the members of the

Digitized by Google

Court, although they were divided upon the question whether the offense charged was felony, and therefore authorized an arrest without warrant.

We think the judgment should be reversed, and prisoner discharged.

The other Justices concurred.

68 487
71 562

THE PEOPLE v. JAMES GARRETT.

Criminal law—Intoxicating liquors—Sale or delivery to minor.

A majority of the Court hold that every sale of intoxicating liquor, where the *delivery* is to one *known* to be a minor, comes within the prohibition of the statute, and that no such liquor can be furnished where a minor is to receive it, whether intended for himself or not, without a violation of the statute, which in their view covers every dealing in which a minor has the liquor delivered to him.

Exceptions before judgment from Eaton. (Hooker, J.) Argued January 26, 1888. Decided February 2, 1888.

Respondent was convicted of furnishing liquor to minor. Conviction affirmed, and court directed to proceed to judgment. The facts are stated in the opinion.

Dean & McCall, for respondent.

Moses Taggart, Attorney General, and *J. M. C. Smith*, prosecuting attorney, for the People.

MORSE, J. My reasons for affirming the conviction in this case are these:

The undisputed facts are that the defendant sold, gave, and furnished to a boy 14 years old a bottle of beer, which the boy with other boys afterwards drank. The order for

Digitized by Google

the beer, which purported to be signed by one William F. Mayer, cuts no figure in the case. The defendant knew the boy was a minor, and gave him the liquor. The intent is plain from this fact. There, then, could be no mistake about the boy's age. It cannot be considered that the defendant supposed the boy was 21.

The statute is not only aimed at the selling, but prohibits also, the giving or furnishing, of liquor as a beverage to a minor. The defendant must have known that the boy might taste or drink of the beer before he got across the street if he so desired. It must be held that the Legislature intended to prevent the delivering of liquor to children; that they should "touch not, taste not, handle not." It is not an uncommon thing in cities for parents and others to send children of tender years into dram-shops after liquor. It makes no difference in my opinion, under the law, whether the liquor thus procured is to be used by the adults or the children. It is within the statute, which prohibits the sale, giving, or furnishing of liquor to minors.

Any other holding must subject children to the temptations that surround and abound in the saloons, without remedy. The present case is a good illustration of the results that would necessarily follow a refusal of this Court to affirm the conviction of this defendant.

One, Bill Badger, the boy says, gave him this order. Mayer, whose name was signed to it, and who had before sent to the defendant's place for liquor, never saw the order, and did not authorize it. The boy, on this forged order, with money given him by another boy, gets a bottle of beer of the defendant, and he and the other boys drink it up. We ought not to acquit the defendant of a violation of this statute, and thus encourage transactions of this kind. The only safe rule is to hold that a child cannot be made an agent to purchase or get liquor. And this I think is the plain intent of the law.

Digitized by Google

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred.

CAMPBELL, J. (*dissenting*). Respondent was complained of and convicted for furnishing liquor to a minor. A boy came to his place of business with a written order from a grown-up person in these words:

"Please let the boy have one bottle of beer, and oblige.
"WILLIAM F. MAYER."

He asked the lad if the beer was for Mr. Mayer, and he answered it was. He thereupon sold him the bottle. Defendant testified that he had frequently sold and sent beer to Mr. Mayer, who was in the habit of sending for it, and supposed he had done so in this case. The order was not signed by Mayer in fact, and the boy really wanted the beer for himself. It was written and given the boy by another person.

The court charged the jury that they should find defendant guilty on the facts, and that it made no difference that he acted honestly, without criminal intent, and that the sale should be regarded as one made to the boy, and therefore within the statute against sales to minors.

A majority of the Court think that every sale where the delivery is to one known to be a minor comes within the law, and that no intoxicating liquor can be furnished where a minor is to receive it, whether intended for himself or not, without a violation of the statute, which in their view covers every dealing in which a minor has the liquor delivered to him. The statute declares it unlawful—

"To sell, furnish to, or give any spirituous, malt, brewed, fermented, or vinous liquors to any minor," etc. Laws of 1881, p. 351, § 2.

The same section goes on to provide as follows:

"The fact of selling, giving, or furnishing any of said liquors to any minor shall be a *prima facie* presumption of an intent on the part of the person so selling, giving, or furnishing such liquor to violate the law."

I do not myself think that any criminal statute can be

Digitized by Google

fairly construed as including acts done with a reasonable and honest belief that the facts are not such as are specified in the law. It is a principle which is practically universal that there must be a criminal mind to make a crime. It is quite possible for a minor to have all the appearance of a grown-up person, and to be so reputed, and it would be a very harsh construction to hold a person criminally liable for being deceived in his age. And it is certainly not only possible, but common, for persons under age, and known to be so, to be sent on all sorts of household errands, and where a sale would be lawful to the adult members of a family I can see no reason why they may not purchase beer or other liquors by servants or agents as innocently as by themselves. This, I think, is evidently contemplated by the statute, which declares such delivery to a minor *prima facie* evidence of a criminal intent. This necessarily assumes that the presumption is disputable, and liable to be overthrown by facts to the contrary. In my view, the statute itself forbids holding the presumption conclusive, and does not propose to violate the general maxims of criminal jurisprudence, which punish none but those having guilty intent. The jury might very likely have found a wrong intent, but I think it was for them to say.

Digitized by Google

The People v. Michael Horrigan.

Criminal law—Larceny—Dwelling-house.

A building, the upper part of which is used in the day-time as medical and other offices, and at night by *one* occupant, a single man, who sleeps in a furnished room in the basement, which is his only abiding place, is protected by the statute punishing stealing from a dwelling-house in the day-time.

Error to recorder's court of Detroit. (Swift, J.) Argued January 27, 1888. Decided February 2, 1888.

Respondent was convicted of stealing from a dwelling-house in the day-time, and sentenced to nine months' imprisonment. Judgment affirmed. The facts are stated in the opinion.

James H. Pound, for respondent.

George F. Robison, prosecuting attorney, for the People.

Campbell, J. Respondent was convicted of stealing from a dwelling-house in the day-time. The only question raised is whether the building from which the theft took place was a dwelling.

Mr. Tape, whose money was stolen, had a furnished room in the basement of a building, the upper part of which was, in the day-time, used by him and others as medical and other offices. At night he was the only occupant. He slept in the basement room, and had no other abiding place.

Unless it is impossible for a single man to have a dwelling, we see no reason for holding that this room was not Mr. Tape's dwelling. It was to all intents and purposes his home. It was precisely, in its circumstances, like chambers in the inns of court, which have always been so treated.

Digitized by Google

The question is not one of technicality. He did not occupy his room as a mere watchman or care-keeper of a large building. His occupancy was separate and entirely for his own uses. It was just such an occupancy as if he had used the whole of a small house, one room for lodging and one for business. The size of the house, which is an ordinary city house, can make no difference, so long as his tenancy is distinct.

We think the conviction was right, and should be affirmed. The other Justices concurred.

ALICE POTTS v. LEWIS POTTS.

Divorce—Alimony—Contempt.

1. An order allowing complainant $8 per week as temporary alimony is held a reasonable one.
2. The possession by a wife of non-productive property, or property not available in her hands to obtain the necessary means to prosecute a suit for divorce, will not prevent the allowance of temporary alimony. *Ross v. Griffin*, 53 Mich. 8.
3. Where a husband informs his wife that he will not pay temporary alimony awarded her by the court, a formal demand on her part is unnecessary to lay the foundation for contempt proceedings.

Appeal from St. Clair. (Stevens, J.) Argued January 27, 1888. Decided February 2, 1888.

Appeal from order convicting appellant of contempt for non-payment of temporary alimony. Order affirmed. The facts are stated in the opinion.

Chadwick & Wood, for complainant.

Frank Whipple (*Atkinson & Vance*, of counsel), for defendant.

Digitized by Google

MORSE, J. May 24, 1887, the complainant filed her bill for divorce in the circuit court for the county of St. Clair, in chancery. She alleges extreme cruelty and adultery. The defendant filed an answer denying the charges.

The parties were married December 6, 1882, and have one child, the issue of such marriage, of the age of three years and six months at the time of the filing of the bill.

Upon petition and hearing, the circuit judge made an order requiring the defendant to pay to the complainant weekly the sum of eight dollars per week as temporary alimony, such payments to be made from the twenty-fifth day of June, 1887, and continue until the further order of the court; and that he also pay to complainant's solicitors $30 within 15 days, and the same sum within 30 days, from the same date, towards the payment of her expenses in taking proofs. This order was made June 25, 1887.

The alimony was not paid. On the twenty-sixth of September, the circuit judge entered an order in the cause that the defendant, on the third day of October, show cause why an attachment as for contempt should not issue against him. This order was based on the affidavit of one of complainant's solicitors that on the seventh, fifteenth, and twenty-second days of July, and on the eighteenth day of September, he personally served upon the defendant copies of the order for the payment of alimony, and that said defendant refused to pay the same to him, or any part thereof. There was also filed the affidavit of the other solicitor for complainant that no alimony had been paid to him, and the affidavit of the complainant that she had given a power of attorney to Chadwick & Wood, her solicitors, to collect the amount allowed to her per week, and that defendant had at various times informed her that he would not pay any of said money, and defied her to take any steps to compel payment, stating that he would take the case to the Supreme Court, and that his counsel had advised him to defy the order of the

Digitized by Google

court; that defendant had not paid her any portion of said alimony.

On the twenty-sixth of September, a copy of the order to show cause, and affidavits upon which it was based, was personally served upon the defendant.

October 3, the defendant did not appear, and the hearing of the matter of contempt was continued until October 8, 1887.

On that day the defendant did not appear, and, upon the showing of service of the order to show cause, the court adjudged that the defendant was guilty of contempt, and ordered, adjudged, and decreed that he be committed to the common jail of St. Clair county, and there be confined until he paid the alimony, together with the costs of his arrest and detention, and also until he purged himself of the contempt, or until the further order of the court, and directed the usual attachment and commitment to issue against him.

From this order of conviction and commitment the defendant appeals.

It is urged upon the part of the defendant that, by negotiations and settlements upon other separations before the time of the filing of complainant's present bill, she has acquired and now holds considerable property, which has been given her by the defendant.

It appears from the records in the office of the register of deeds for St. Clair county that there is of record in that office mortgages standing in her name, and undischarged, to the amount of about $1,300; and a mortgage, undischarged, executed by her to Sarah J. McE roy for the sum of $400, being a part of the purchase price of a lot owned by complainant in the city of Port Huron. The consideration of the deed of this lot, as recited in said deed, was $1,050.

Complainant claims that defendant is worth at least $100,000, with an income of $10,000 per year, and shows by affi-

Digitized by Google

davits that he is worth at least $75,000. He claims he is not worth to exceed $20,000.

Complainant further shows by her bill and petition for alimony that she is destitute of means of supporting herself and child. The proof that these mortgages are of record in her name is not conclusive that she is the owner of them.

We think the order for alimony a reasonable one. Even if complainant is possessed of a little property, the defendant, with his means, ought not to complain that he is assessed eight dollars per week towards the support of his infant child; and there is no such showing as to make it certain that the property that the complainant possesses is productive, or available in her hands to obtain the means for her necessary expenses in carrying on this suit. *Ross v. Griffin*, 53 Mich. 8 (18 N. W. Rep. 534.)

It is objected that no proper demand was made upon the defendant. There is, indeed, no showing that the defendant was informed that Chadwick & Wood, complainant's solicitors, had authority from her to collect or demand the alimony payable to her, but one of the solicitors also demanded the $60 which was due to them, and there is no excuse for the non-payment of this sum. Besides, it is evident that the defendant did not intend to pay, and was advised not to do so. He also informed complainant that he would not pay, which was sufficient in her case to render a formal demand upon her part unnecessary.

We think the defendant guilty of contempt, and the proceeding adjudging him in contempt, and the order punishing him therefor, regular and proper. The order is therefore affirmed. Complainant will recover costs of this Court.

The other Justices concurred.

Digitized by Google

68 496
147 680
68 496
146 290
146 292

THE PEOPLE v. ISAAC ELLSWORTH.

Criminal law—Conviction as for third offense—Information—Plea of guilty—Larceny—Sentence.

1. The words "conviction" and "sentence" are not synonymous.
2. Under an information for larceny which alleges *two* prior *convictions* of the respondent for the same offense, but only *one sentence*, he cannot be sentenced as for a *third* offense under How. Stat. § 9425, nor can such sentence be held good for the excess over five years, under How. Stat. § 9141 or 9424, but will be affirmed for *five* years.
3. All doubts must be solved in favor of the accused, and it must appear from the record what *exact* offense was intended to be punished, and there should be no reasonable doubt for what crime the respondent is sentenced. *People v. Jones*, 49 Mich. 594.
4. Where it appears from the record that a respondent was assigned counsel of his own choice, with whom he consulted before entering a plea of guilty, and that the circuit judge had a private examination of the accused before sentence, it must be presumed that he was satisfied in such interview that the plea was "made freely, with full knowledge of the nature of the accusation, and without undue influence."

Error to Genesee. (Joslin, J., presiding.) Argued January 27, 1888. Decided February 2, 1888.

Respondent was convicted of larceny, as for a *third* offense, and sentenced to State prison for ten years. Sentence vacated for the excess, and affirmed for five years. The facts are stated in the opinion.

Blair, Wilson & Blair, for respondent.

Moses Taggart, Attorney General, and *E. S. Lee*, prosecuting attorney, for the People.

MORSE, J. On the sixteenth day of November, 1885, in

Digitized by Google

the circuit court for the county of Genesee, the respondent pleaded guilty to the following information, signed by the prosecuting attorney, and duly verified:

"Edward S. Lee, prosecuting attorney in and for the county of Genesee aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the November term thereof, in the year one thousand eight hundred and eighty-five, and gives the court here to understand and be informed that Isaac Ellsworth, late of the village of Fenton, in said county, on, to wit, the fourteenth day of October, A. D. 1885, at the village of Fenton, Genesee county, two five-year old sorrel gelding horses, one top buggy, and one set double harness, in all of the value of four hundred dollars, of the goods and chattels of one Dexter Horton, in the possession of him, the said Dexter Horton, then and there being found, did feloniously steal, take, and carry away.

"And that said Isaac Ellsworth, heretofore, to wit, on the twelfth day of October, A. D. 1875, was duly convicted upon information, in the circuit court for Genesee county, of the crime of larceny of the goods and chattels of one John Getchell, committed August 24, 1875, at the township of Vienna, in said county; and was also, on said twelfth day of October, 1875, duly convicted upon another information, in the said circuit court, of the crime of larceny of the goods and chattels of one Ira Bebee, committed September 8, 1875, at the city of Flint, in said county, and that the said Isaac Ellsworth was duly, on said *last* conviction, sentenced to be imprisoned in the State prison at Jackson, at hard labor, for a period of five years,—against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

On the same day he was sentenced; the record of his sentence reading as follows:

"In this cause, Isaac Ellsworth, the respondent, having been, by his plea of guilty, duly convicted of the crime of larceny, on the fourteenth day of October, A. D. 1885, at the village of Fenton, Genesee county, did feloniously steal, take, and carry away two five-year old sorrel gelding horses, one top buggy, and one set double harness, in all of the value of four hundred dollars, of the goods and chattels of one Dexter

Digitized by Google

Horton, the larceny of the same being charged in the information as a third offense.

"And it appearing to the court from the records thereof, as well as from said information and admission of said defendant, that said defendant, Isaac Ellsworth, heretofore, to wit, on the twelfth day of October, A. D. 1875, was duly convicted on information, in the circuit court for Genesee county, of the crime of larceny of the goods and chattels of one John Getchell, committed August 24, 1875, at the township of Vienna, in said county; and was also, on said twelfth day of October, 1875, duly convicted upon another information, in the said circuit court, of the crime of larceny of goods and chattels of one Ira Bebee, committed Sept. 8, 1875, at the city of Flint, in said county, the said Isaac Ellsworth having been on said conviction duly sentenced to be imprisoned in the State prison at Jackson, at hard labor, for a term of five years, as appears by the record thereof.

"And [the said respondent] having been, on motion of the prosecuting attorney of the county, duly arraigned at the bar in open court for sentence, and having there been asked by the court whether he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary; and it appearing to the court, from a private examination of the respondent by the court, that said respondent is of the age of thirty-two years.

"Therefore, it is ordered and adjudged by said court, now here, that the said Isaac Ellsworth be confined at hard labor in the State prison at Jackson, in this State, for the period of ten years from and including this day."

Two objections are urged against the validity of this sentence:

1. It is claimed that the information did not warrant any sentence over and above the maximum number of years prescribed for larceny, to wit, five years; and that the excess must be remitted.

2. The record does not show such a private examination upon a plea of guilty, before sentence, as the statute requires, and therefore the respondent must be discharged from any further confinement.

It is argued by respondent's counsel that it must be considered, taking the information and record of sentence together, that the respondent was informed against and sen-

Digitized by Google

tenced as for a third offense, under section 9425, How. Stat., which reads as follows:

"When any such convict shall have been twice before sentenced to imprisonment at hard labor for a period of not less than one year at each time, by any court in this State, or in any other of the United States, he shall be sentenced to imprisonment at hard labor for life, or for a term of not less than seven years in addition to the punishment prescribed by law for the offense of which he shall then be convicted."

And that such sentence cannot be sustained under that section, as the information avers only one sentence before the last conviction. It alleges two convictions, but the word "*conviction*," has been held not synonymous with the word "*sentence*," citing *Com. v. Lockwood*, 109 Mass. 323, and *Quintard v. Knoedler*, 53 Conn. 485 (2 Atl. Rep. 752). We have no doubt that respondent's counsel is correct in the claim that his client could not be sentenced as for a third offense under the information as filed.

The counsel further claims that there is no other statute under which this sentence can be held good as to the excess over five years. In his argument he refers to section 9424, How. Stat., which provides as follows:

"When any person shall be convicted of any offense, and shall be duly sentenced therefor to confinement in the State prison of this State for one year or more, and it shall be alleged in the indictment on which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment by any court in this State, or in any other of the United States, for a period not less than one year, he shall be sentenced to be punished by imprisonment in the State prison not more than seven years, in addition to the punishment prescribed by law for the offense of which he shall then be convicted."

He admits that, if the averment of the conviction of the larceny from Getchell could be left out of the information, the proceedings might be sustained under this section. But he claims that the information must be construed as it stands,

Digitized by Google

and that the recital in the record of sentence that the larceny from Horton was charged in the information as a third offense, fixes the character of the charge, and the section under which the sentence was imposed by Judge Joslin, beyond cavil or dispute; that such recital renders it clear and plain that the respondent was sentenced under section 9425.

The counsel for the respondent further shows beyond question, we think, that there is no statute under which such sentence could be imposed other than those already referred to, save and excepting section 9141, How. Stat. This statute is as follows:

"Every person who shall have been convicted, upon indictment, either of the crime of larceny, or of being accessory to the crime of larceny before the fact, and shall afterwards commit the crime of larceny, or be accessory thereto before the fact, and be convicted thereof upon indictment, and every person who shall be convicted at the same term of court, either as principal or as accessory before the fact, in three distinct larcenies, shall be deemed a common and notorious thief, and shall be punished by imprisonment in the State prison not more than fifteen years."

In relation to this statute the counsel truly says that the sentence cannot stand under the second clause, as the three convictions are not shown in the information to have been at the same term of court. And, under the first clause, he submits, as he does in reference to section 9424, that the information does not allege the offense named therein, unless one of the convictions therein averred be treated as surplusage, and asks:

"Now, if we say there is surplusage, where shall we find it,—in the statement of the bare conviction, or in the statement of the conviction followed by sentence to the State prison? Shall we reject the least important or the most important?"

If we reject the least important,—the bare conviction,—then he admits the proceedings may be sustained under section 9424, if such surplusage can be rejected. But he insists

Digitized by Google

that the record throughout shows conclusively that the judgment of the court was based upon a third offense, and that this Court has no power to strike out, as it were, the statement of the larceny from Getchell in the information, and hold a sentence good under such amended information, when the court imposed the sentence upon the theory that the information was for a third and other offense.

There is much force in this argument. The limit of the penalty is not the same under sections 9424 and 9425, the latter exceeding the former, and it would naturally seem that a court would be likely to impose a greater term of years in the sentence for a third offense under section 9425 than for a second offense under section 9424. If so, in the present case, then it is not possible for this Court to say how many years of the excess were added more than there would have been if the penalty had been imposed as for a second conviction. If it may have been that the court, in this case, imposed a heavier sentence than he would if he had understood that the respondent was informed against under section 9424,—and we are unable to say whether he did or not, or, if he did, how many years were added because of such understanding,—then none of the excess over five years ought, as a matter of common right and justice, to stand against the accused. All doubts must be solved in favor of the accused. It must appear from the record what exact offense was intended to be punished, and there should be no reasonable doubt for what crime the respondent is sentenced. *People v. Jones*, 49 Mich. 694 (14 N. W. Rep. 573).

The Attorney General and the prosecuting attorney for the county of Genesee, who appear for the people, undertake to claim that this sentence can be maintained by treating the information as one filed under section 9141. But this cannot be done without rejecting a portion of the information, —one of the convictions,—and treating it, as before said, as amended.

Digitized by Google

It is manifest that this information was filed with the intent of charging an offense under section 9125, and was so understood by the court; and the sentence was imposed as for a third offense. Therefore it cannot now be used to support a conviction or sentence as of a second offense. The sentence cannot be sustained under section 9141.

If the circuit judge had not imposed this sentence as for a third offense, we think it could have been sustained under section 9424, under the authorities cited, and the opinion in the case of the *People v. Calvin*, 60 Mich. 113 (26 N. W. Rep. 851). But, for the reasons already stated, it cannot, in right and justice, be allowed to stand beyond the term of five years. The information fails to charge a conviction under section 9125, because only one sentence is averred. The sentence is good only for larceny. *People v. Jones*, 49 Mich. 591 (14 N. W. Rep. 573); *People v. Town*, 53 Id. 488 (19 N. W. Rep. 158); How. Stat. §§ 9140, 9614.

As to the second objection to the sentence, we think the presumption from the record is that the circuit judge performed his duty under the statute. The record shows that the respondent was assigned able counsel of his own choice, and had consultation with him before entering his plea of guilty. It also shows that the circuit judge had a private examination of the accused before sentence, and it must be inferred that he was satisfied in that interview that the plea was—

"Made freely, with full knowledge of the nature of the accusation, and without undue influence."

The sentence will therefore be vacated for the excess, and affirmed for the term of five years.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

Digitized by Google

68 506
68 639
69 16
69 165
69 167
75 460
68 503
76 517
68 503
92 94
92 278
92 570
68 503
97 600
68 503
99 445
68 503
139 34

THE CITY OF DETROIT v. JAMES W. DALY ET AL.

Condemnation proceedings—Detroit city charter—Opening street—Damages—Verdict of jury—Necessity of improvement—Assessment of benefits—Taxing district.

1. The provisions of the charter of the city of Detroit authorizing the jury in condemnation cases to give a lumping verdict, deducting from the proper damages the enhanced value by benefits given to the owner's land *not* taken, and authorizing the city to determine in advance an assessment district, including the property which it may deem benefited, and providing that any compensation or damages shall be apportioned one-half against the city at large and one-half against the property benefited, are not sufficiently guarded, and as to a part at least are entirely without legal safeguards.
2. The Constitution does not allow property to be condemned unless there is a *public* necessity for it, and this must be a *real* necessity, without which private citizens cannot be disturbed in the enjoyment of their freeholds in their own way.
3. In estimating the necessity for taking private property for public purposes, it can make no difference to the public who owns the land. If it is necessary to take it, that necessity must be as great where it is owned *separately* as where it is part of a *larger* property; in which *latter* case the public have no right to force its sale for less than its *independent* value.
4. Every valid assessment must be based on some legally ordained basis of apportionment, and not arbitrarily. The charge, whether based on supposed benefits or any other legal burden, must be spread over the taxing district according to some uniformly applied rule, and in such a way as to show a compliance with that rule, whatever it may be.
5. There *may* be a necessity of leaving considerable discretion to the authorities who fix a taxing district, if it can be made to differ from the ordinary municipal subdivisions; but it cannot be such an *uncontrolled* discretion as to leave no public character whatever to the district, and make a purely *private* charge under pretense of setting off an assessment district.
6. It is elementary that no one can be lawfully made to bear more than his share of any public burden, and *that* share must be assessed by some tangible process of distribution.

Digitized by Google

7. The only theory on which the doctrine of charging the expense of public works on property benefited can be maintained is that if local improvements can be conveniently paid for by local assessments, in this way, in the long run, the general public may be charged for the general result with approximate equality. Any other theory of benefits involves the taking of private property for private use, and is unfair and unauthorized. The whole public, or the allotted district, or both, must pay for *all* that the public appropriates.
8. If one person is charged for more benefit than another, it must be because by the rule of apportionment his share is greater in the assessment; but he can only be obliged to pay his share, and must have the means furnished him by the proceedings of knowing *exactly* what his share is; and this cannot be done unless there is a *separate* finding of the value of the property taken and of the enhanced value of *all* the parcels of property within the district, so that the percentage of each owner can be easily calculated, as in the case of any other tax or assessment.
9. There may be cases where the damage to property, by the establishment of a public way, includes *more* than the mere value of the land taken; but there can be no case where the price paid by the public can lawfully be any *less* than the value of the property taken.[1]

Appeal from recorder's court of Detroit. (Swift, J.) Argued October 13, 1887. Decided March 2, 1888.

Appeal from order confirming a verdict in a street-opening case. Proceedings quashed. The facts are stated in the opinion.

Corliss, Andrus & Leete, for appellants.

John W. McGrath, city counselor, and *William S. Sheeran*, city attorney, for petitioner.

CAMPBELL, J. The city of Detroit carried through proceedings in the recorder's court to open Riopelle street, one of its north and south streets, from its existing northern

[1] See *Weber v. Stragray*, 75 Mich. 33 (head-note 4), holding that a failure to allow damages to the value of land for *farming* purposes, taken for a highway, will prevent the public acquiring any rights or interest in the property condemned.

Digitized by Google

terminus on Farnsworth street northerly to Ferry street, a distance of 1,050 and 54-100 feet in length, and 60 feet in width, condemning for that purpose not far from an acre and a half of city property. The extension ran through a solid block of land about 338 feet wide, all of which was owned in a body by James E. and George H. Scripps, except a small part at the south end owned by Daly and Jerome.

The property through which the street was proposed to be run is a block of rather less than 10 acres, with a width of 338 feet by 1,050 feet. As left by the street opening it leaves two parcels of the same depth and 139 feet wide, one of which is detached from the other and incapable of use with it. The testimony of competent witnesses decidedly predominates in favor of its being more valuable as a single manufacturing lot than in two smaller ones, and that it could only be made available if so divided by further subdivision into small lots, the sale of which is not in demand. The value of the street parcel is placed by most of the testimony at from $3,700 to $6,000, and nowhere less than $3,000.

The testimony of any existing necessity is confined entirely to the convenience of the Peninsula Car Works on the north side of Ferry street, and of the lots on Riopelle street southward. There is no testimony fixing any value of benefits to the car company's lot, and none fixing them very high on the southerly lots. There is no testimony showing that the extension of Riopelle street northward would be necessary to furnish these lots an outlet, and practically the only benefit which the witnesses seem to have regarded was that which would accrue to Messrs. Scripps by cutting up their land so as to spoil it for the uses they have destined it for.

The jury were instructed to find the full value of land taken where the whole of a lot was taken; but where part was taken and part left, they were to apply the advantage caused by the street on the value of the land taken, and give only the resulting balance, if any, as damages, not showing,

Digitized by Google

however, what they allowed for the value of the land, and how much was deducted. Beyond this, they were to assess on the property left its share of the benefits to the assessment district. The result of this process was that the jury found that for the Scripps land no damage should be allowed, but furthermore assessed against it $115, or about one-fourth of the entire benefits assessed, which amounted to $450, of which the city paid half. All of the benefits assessed were adjudged to Daly and Jerome for so much of their land as was taken, and they were charged $15 for their share of the benefits. The assessment district was made to include a parcel of the whole width of the Riopelle farm, 171 feet deep, lying on the north side of Ferry street (the middle of which was opposite the north end of the extension of Riopelle street), and, in addition to this, the Scripps, Daly, and Jerome property, and three tiers of lots, or a block and a half, on either side of Riopelle street as already existing. The lot north of Ferry street, belonging to the Peninsular Car Company, was assessed $25, and the thirty lots south of Farnsworth street, in the blocks lying on Riopelle street, were assessed $50, or $1.66 each.

The result of all this was not only that the Scripps property was taken without compensation, but they were assessed $115 for the privilege of having it taken. They appeal on various grounds, involving, among other things, the right to allow such results to be reached. The injustice of the finding is so monstrous that we should have no hesitation in setting it aside under the general power given us to review such proceedings. But as important principles are involved, coming within a considerable body of our decisions which have been completely disregarded, we are called on to refer again to some of the rules of law which control or should control these proceedings. They have been announced so often that we do not think it necessary to cite the authorities by name. Many of them were cited by counsel. And as we are required

Digitized by Google

to consider the verdict and proceedings on the merits on the appeal, as has always been done in disposing of such special proceedings, we cannot confine our view to dry questions of law, but must look to substantial justice.

The charter, which differs in this respect from the State laws governing similar proceedings elsewhere, does provide expressly that the jury may give a lumping verdict, deducting from the proper damages the enhanced value by benefits given to the owner's land not taken. It also provides that the city may determine in advance an assessment district, including the property which it may deem benefited, and that any compensation or damages shall be apportioned half against the city at large and half against the property benefited. These provisions are not sufficiently guarded, and as to a part at least are entirely without legal safeguards. A simple comparison of facts, according to the testimony given, will show how easily the provisions of the charter may be perverted to mischief.

Ostensibly, and probably in the view of the Legislature, who would certainly not designedly deprive land-owners in Detroit of the rights enjoyed by them elsewhere, the theory of street opening is this: No street shall be opened unless the benefit to the public is equal to the value of the property taken, and half of that value shall be paid by the whole city, and the other half shall be apportioned on the property in that part of the city directly benefited in proportion to the benefits. If the general and local benefits do not equal the value of the property taken it cannot be taken. The Constitution does not allow property to be condemned unless there is a public necessity for it, and this must be a real necessity, without which private citizens cannot be disturbed in the enjoyment of their freeholds in their own way.

Leaving out the supposed advantage to appellants, it cannot be said that there is a respectable showing of any conceivable necessity, and it certainly cannot be held with any

Digitized by Google

regard to common sense that there is a public necessity for improving the private property of these parties against their will. This cannot be lawfully done. But to get at the money standard, we must look at the value of the property taken. This, at the lowest figure, would be, as to all the appellants, considerable over $3,000, and a verdict could hardly be sustained on the testimony which should place it as low as that. Unless the public benefit exceeds that sum there can be no necessity. In estimating the necessity it can make no difference to the public who owns the land. If it is necessary to take it, that necessity must be as great where it is owned separately as where it is part of a larger property. If this strip were to be sold separately, it would be worth several thousand dollars. The public have no right to force its sale —for that is the legal effect of condemnation, and it is so called expressly in the civil law, from which our doctrine of eminent domain is borrowed—for any less than its independent value. If this value were found separately, the charter requires the greater public of the city to pay half, and the lesser public of the assessment district to pay the other half. If, as is usual, the neighboring land is in that district, it must pay its share of the benefit to the lands in that district. But this share is in the nature of an assessment, which this statute requires to be made by a jury in connection with the condemnation, but which, under the general law of 1883, is made, as it certainly can be better made, after the property is condemned, by the ordinary assessing officers, thus preventing the anomaly of different official valuations of the same property. Every valid assessment must be based on the legally ordained basis of apportionment, and not arbitrarily. The charge, whether based on supposed benefits or any other legal burden, must be spread over the taxing district according to some uniformly applied rule, and in such a way as to show a compliance with that rule, whatever it may be. This doctrine has been settled by a large number of

Digitized by Google

cases in this Court. Under this statute only half of the cost or damages can be levied on the district declared to be specially benefited. If it could all be laid on the district, and if the district could be made as small as the one before us, it would be ridiculous to speak of the improvement as one of public necessity, when there is really no public whatever.

There may be a necessity of leaving considerable discretion to the authorities who fix a taxing district, if it can be made to differ from the ordinary municipal subdivisions; but it cannot be such an uncontrolled discretion as to leave no public character whatever to the district, and make a purely private charge under pretense of setting off an assessment district. While it is quite possible that a municipal subdivision would not be an appropriate territory to charge with the special improvement, yet, on the other hand, if the matter could be left to the pure caprice of the city authorities, it is evident that there would be no equality in public burdens. No case could show more plainly the danger of such an abuse than this record shows it. Here it is evident that the district could not by any imaginable theory receive as a district anything approaching half of the value of the land taken. We had occasion in *Clay v. Grand Rapids*, 60 Mich. 451 (27 N. W. Rep. 596), to refer to the illegality of making a private property of small extent assume the name of an assessment district.

By the ingenious process followed in this case, what is claimed to be the public has obtained several thousand dollars' worth of property for half of the price, of which the city pays only $225, or not more than 10 per cent. of the real value, while the appellants have been made to pay nine-tenths of the whole of it, when, if they had been made to bear even the whole charge laid on the assessing district, they could only be charged with half of the value.

It is elementary that no one can be lawfully made to bear

Digitized by Google

more than his share of any public burden, and that share must be assessed by some tangible process of distribution. This district, under the law, is subject to the rule that one-half of the improvement should be paid by the district, and this must be divided in money burdens on some fair money basis.

The only theory on which the doctrine of charging the expense of public works on property benefited can be maintained is that if local improvements can be conveniently paid for by local assessments, in this way, in the long run, the general public may be charged for the general result with approximate equality. Any other theory of benefits involves the taking of private property for private use, and is unfair and unauthorized. The whole public, or the allotted district, or both, must pay for all that the public appropriates. If one person is charged for more benefit than another, it must be because by the rule of apportionment his share is greater in the assessment; but he can only be obliged to pay his share, and must have the means furnished him by the proceedings of knowing exactly what his share is. Otherwise the charge may be arbitrary.

This cannot be done unless there is a separate finding of the value of the property taken and of the enhanced value of all the parcels of property within the district, so that the percentage of each owner can easily be calculated, as in the case of any other tax or assessment. It cannot be got at in any other way. There may be cases where the damage to property, by the establishment of a public way, includes more than the mere value of the land taken; but there can be no case where the price paid by the public can lawfully be any less than the value of the property taken. If this strip would be worth several thousand dollars to one owner, who owns no more, it is because it would probably sell for that. It would sell for just as much if owned by appellants, and there is no sense in saying it is worth any less to the public

Digitized by Google

in the one case than in the other, and no jury can properly find otherwise. If the adjoining land were owned by different owners it would be just as much benefited as if owned by the same owners in similar parcels, and the benefits should be apportioned accordingly. But when the jury are allowed to make the offset, and declare damages and benefits equal, without specifying the amount, the result, as shown here, is to make the owner bear the whole burden, and relieve the city and his neighbors of their legal shares of the expense.

So much of the charter as requires such a process is illegal, and should be disregarded.

This question is the most important one urged on the argument. But on the facts it is plain that there was not only no fair apportionment of damages and benefits, but that there was no necessity made out. There is no reason to believe that the jury would have found in favor of the street opening if they had supposed the city should be charged with half of the real damages.

It is much to be regretted that attempts should be made to put Detroit on a different footing from other cities in the appropriation of private property, and that the law, such as it is, should be perverted by verdicts like the present. The act of 1883 was designed to put all cities on the same footing, although it allows every city to choose, in any case, whether to follow its own special charter or regulations, or use the general statute. There is manifest injustice in having different rules in the same city, and great risk of injustice in having radically different systems at all. But the duty exists under both sets of laws to guard against attempts to serve merely private purposes under the guise of public condemnations.

These proceedings must be quashed entirely. Apart from the legal difficulties pointed out, it appears plainly that there is no public necessity for opening this small length of street.

Digitized by Google

The proceedings must be quashed, with costs to the appellants.

CHAMPLIN and MORSE, JJ., concurred.

SHERWOOD, C. J. So long as it shall remain the law of the State that, when the private property of a person is taken for public use as a street, the compensation, in whole or in part, to be made therefor may be made to consist of such benefits arising from the making of the street as twelve of the owner's neighbors may be induced to believe, by means as likely to be wrong as right, will accrue to him if he will but make such use of the land as to avail himself of them, I shall feel obliged to agree with the opinion filed in this case by my brethren.

But I cannot believe that the framers of our Constitutions, either State or National, which provide that private property shall not be taken for public use without just compensation therefor, and that "private property shall not be taken for public improvements in cities and villages * * * unless the compensation therefor shall first be paid," ever anticipated that such compensation could be made up of benefits to the owner entirely speculative in character, the value of which should be estimated by persons whose pecuniary interests would induce them to place the lowest possible value upon the property to be taken, and the highest appraisal on the benefits claimed.

The compensation intended by these provisions of our Constitutions is the fair cash market value of the property to be taken, and the payment intended is required to be in the legal currency of the country, and it should make no difference what incidental benefits the owner may be thought to derive.

His property can never, in my judgment, be taken for public use without making such compensation and payment to him therefor.

Digitized by Google

The Constitution does not allow the Legislature to compel the citizen to exchange his homestead for the benefits it is thought he may derive, for the privilege of using a street in common with the rest of the community, but which he does not want, and which he deems an actual damage to him. And I have always regarded our law, which permits this to be done, as unconstitutional, and I do not think it needs argument or authority to show the conflict. The benefits he receives, which can be considered by the public, are common to all interested, and he can only be lawfully taxed equally with them for the improvement.

I have heretofore given a *quasi* acquiescence, with a protest, whenever the question has been presented in the decisions given, in the hope that the Legislature would repeal this obnoxious provision. This, however, has not been done, and I believe the time has arrived when this Court should cease to enforce this unconstitutional enactment against property owners in our State, and rid our people of the expensive litigation, wrong, and oppression it seems necessarily to involve in almost every case where its enforcement is attempted.

Not only for the reasons herein given, but also for those stated by my Brother CAMPBELL, I think the proceedings should be quashed, with costs to appellants.

Digitized by Google

68 514
115 198

ADDISON P. COOK v. THOMAS J. HOPKINS.

[See 60 Mich. 310.]

Ejectment—Land contract—Statute of limitations—Adverse possession.

1. In this case the questions of *fact* submitted to the jury, and found in favor of the defendant, were passed upon in *Cook v. Rounds*, 60 Mich. 310, with a like result, and cannot now be held to have been improperly submitted to the jury.
2. A land contract giving, if fulfilled, an estate in *fee-simple*, can never expire by its own limitations except by forfeiture for breach of condition, and the vendor has no right of entry for any *other* reason.
3. An action of ejectment by the vendor in a land contract giving, if fulfilled, an estate in *fee-simple*, brought more than 20 years after default in the last payment stipulated for therein, during which time there has been an *adverse* possession, is barred by the statute of limitations.

Error to Kent. (Montgomery, J.) Argued October 14, 1887. Decided March 2, 1888.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Norris & Norris, for appellant.

Taggart & Denison, for defendant.

CAMPBELL, J. Plaintiff brought ejectment to recover certain lands in Kent county, which plaintiff acquired through a government title in 1854, and which defendant claims under a holding which can only be sustained under the statute of limitations. Plaintiff claims under a mortgage foreclosure, which appears to us to have been valid, and the other questions are the only ones requiring attention.

Digitized by Google

There is no doubt that defendant and his grantors have held long enough to bar any right of entry, unless prevented from holding adversely by the relations between plaintiff and his own predecessors in title. This is what plaintiff claims to have been the fact.

In December, 1856, plaintiff made a contract to sell the land to George W. Rounds and Charles J. Jaqua for a consideration of $758.44, payable in seven annual installments of $108.35, with annual interest on all unpaid. They were to take subject to all future taxes, and to confine their cutting to the east half of the lot until the fifth installment should be paid, which would be due in 1861. On failure to perform any condition, plaintiff was to be at liberty to consider himself relieved from all covenants and obligations, and his vendees were to forfeit all payments made, and all improvements, and all their interest in the land, and deliver up immediate possession.

The vendees made all their payments which became due up to 1860, and were not in default, therefore, until December, 1860. They did not make the payment then due. But earlier in that year the testimony indicates that one Jacob Winzor, who held a tax title existing prior to their purchase, demanded that they should surrender possession to him. The vendees, as the jury have found, thereupon attempted to abandon their purchase from Cook, and left the land. One of the disputed points was whether Cook was notified of that abandonment, and of their intention no longer to hold under him. While George W. Rounds and Jaqua were holding under Cook, they allowed one Joseph Rounds and Matilda, his wife, to occupy a log-house on the premises. It is claimed as a fact, on which there was evidence, that, upon Winzor's claim being made, Cook's vendees notified Cook of his claim, and desired him to protect them in their title, and that he paid no attention to them. When they abandoned the land it is further claimed that they notified Joseph

Digitized by Google

Rounds that they could not allow him to stay longer under them, and that he attorned to Winzor, and became his tenant. In December, 1860, Winzor conveyed his title to Jaqua and William Carmer, who took possession, and Joseph Rounds became their tenant, and paid them rent, George W. Rounds having no further concern. In January, 1869, Carmer and Jaqua conveyed to Matilda Rounds, Joseph having died, and there has been continuous possession in her and her grantees, defendant now holding that claim. The tax title was invalid as a title.

The court below held that George W. Rounds and Jaqua could not so disclaim previous to December, 1860, as to give Cook any right of entry against them until that time. This suit was brought more than 20 years after default was made in the last payment, in December, 1863. But it was held below that until Cook received notice or became informed that they repudiated his title, or held against it, their holding was subordinate to his, and the statute did not begin to run. Defendant in this case relies not only on the verdict, as establishing a complete defense under the ruling, but upon the further ground that under the undisputed facts the right of entry was barred when suit was begun.

The inquiry, therefore, is within narrow limits.

The defendant, upon the defense referred to in the charge, relies on notice given by Rounds and Jaqua to two persons named Hill and Thornton, who were claimed to have acted as Cook's agents, and who were also shown to have written to Cook. The court left it to the jury to determine whether the testimony satisfied them of Cook's knowledge. It seems to us that there was enough to go to the jury on that subject, and they have found against him. As we held in a former suit of *Cook v. Rounds*, 60 Mich. 310 (27 N. W. Rep. 517), that in our opinion, passing on substantially the same facts, the defense was made out, we cannot now hold that the jury could not pass upon them; and their determination must

Digitized by Google

settle the case, unless plaintiff's counsel are right in another claim, which is not very clearly shown to have been laid before the circuit court, but which is not foreign to the issue.

It does not seem to be seriously doubted that, in ordinary cases, a right of entry must be enforced within the period of limitations; but it is claimed there are some cases where, by reason of some special privity, a person who has been in possession under a certain title cannot dispute it until he puts his landlord back, or at least makes, or attempts to make, a surrender. This view was laid before the jury. But counsel now claim that the privity cannot be determined, whether by disclaimer or in any other way, until the special estate has been completely determined. To sustain this view reference is had to section 8700 of Howell's Statutes, declaring when a right of entry shall be deemed to have accrued in order to set the statute in motion. This section is divided into five heads.

The fifth subdivision declares that, in cases not provided for, the right of entry shall be deemed to have accrued when the claimant or person under whom he claims first acquired the title sued on.

The remainder refers to cases exceptional to this. The first fixes it at the time when one is disseized. That in the present case would be when Winzor entered in 1860. The second declares that an heir or devisee shall be deemed to have the right of entry at the death of the ancestor or testator, unless there is some estate or terms intervening after the death, in which case it is postponed till the intermediate estate terminates. The third, which is the clause relied on here, is to the effect that in case of such intermediate estate, and in all cases where the party claims in remainder or reversion, his right shall accrue when such intermediate or precedent estate would have expired by its own limitation, although he might have entered for forfeiture earlier. But the fourth subdivision declares that the third clause shall not prevent

Digitized by Google

any one from entering when entitled to do so by any forfeiture or breach of condition; but if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition broken.

The contract in question was not for a term of years, but a contract which gave, if fulfilled, an estate in fee-simple. It could never expire by its own limitations except by forfeiture for the breach of condition, and plaintiff has no right of entry for any other reason. This being so, if the contract can be treated as creating an intermediate estate at all, it must come under the fourth subdivision. This would place the right of entry in December, 1860, or at latest in December, 1863, when all the obligation had matured. We do not see how it could be postponed beyond December, 1860, without some waiver or agreement. But it is not very important, because this suit was not begun until 1884, more than twenty years after December, 1863; and, if so, then none of the questions discussed on the other facts or rulings are material, as there is nothing in the case which could save the suit on any theory.

The circumstances of the original change of possession were peculiar, and gave room for claiming all that was claimed before the jury. But we could not review their finding of facts, if it were material. As it is, however, no facts disputed could change the result.

The case has been well and ingeniously argued, and we have reserved our decision to become satisfied; but we can see nothing that could justify any different result.

The judgment must be affirmed.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred.

Digitized by Google

LAFAYETTE R. BURCH v. WILLIAM H. WOODWORTH, ADMINISTRATOR.

Sawing contract—Joint agent—Statute of limitations.

The *real* controversy in this case seems to have turned almost entirely on the question of the statute of limitations, upon which the court charged properly, and the verdict cannot be disturbed on account of it. An examination of the opinion is essential to a correct understanding of the points decided.

Error to Ionia. (Smith, J.) Argued October 20, 1887. Decided March 2, 1888.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

A. A. Ellis, for appellant.

Frank F. Kutts and *D. E. Corbitt*, for plaintiff.

CAMPBELL, J. This was an action to recover a balance due under a contract to cut logs and manufacture them into shingles and lumber. The agreement was made between John H. Anderson and Lorenzo W. Chubb, October 23, 1876, and Burch is Anderson's assignee, and claims to have furnished both lumber and shingles not paid for. The material part of this contract was as follows: Anderson was to cut the logs on a lot mentioned, and saw and deliver shingles and lumber, at two dollars a thousand for shingles of the specified sizes and quality, and five dollars a thousand for lumber sawed as directed. Shingles were to be paid for as fast as 100,000 were delivered, and lumber as fast as each 50,000 feet were delivered. The logs were to be cut clean,—which was defined as including all logs ten inches through at the top end, and all logs half sound measuring twenty inches at

Digitized by Google

the top end. The cutting was to begin at the west end, and cut clean, and to include at least a million, and not more than a million and a half. It was agreed that Oscar House should sort the logs for lumber and shingles, to be sawed as he should direct, and estimate the lumber and count the shingles, and his account should be the final settlement between both parties,—his expenses to be borne by Anderson.

The printed record does not give the date of the beginning of the suit, but it appears to have been in 1885, so that any items arising prior to 1879 would be more than six years before suit. The items of 1879 were all within six years.

Defendant pleaded the general issue, with notice of set-off and limitations. The plaintiff recovered below, and defendant brings error for alleged misdirections.

Plaintiff proved cutting 1,184,000 shingles and 134,000 feet of lumber, all counted by House, who kept the accounts. This completed estimate was made by Mr. House in December, 1879, up to which time he had been paid $2,553. This would leave a trifle less than $500 unpaid, on which interest would run from that time.

It seems that, except in 1877, plaintiff was paid for shingles at the end of each year, ostensibly for each 100,000 delivered, except in 1879, when the amount counted was about 84,000. In 1877, however, defendant retained $197 for alleged defective shingles. The lumber furnished in 1879 was 34,000 feet. Most of the cutting that year was done for plaintiff by Davis and Porter. All that they cut was from logs of Chubb in the pond, and they reached, as made by Porter, twenty-eight thousand, and by Davis, fifty odd thousand. The few shingles cut by plaintiff in 1879 were from logs not inspected, but obtained on the land of Chubb. Anderson swore that he put in over a million feet of logs.

There was a dispute of testimony between House and

Digitized by Google

plaintiff concerning the delivery and computation in 1879, and some other conflicts of testimony.

The case took a somewhat peculiar turn, as the judge charged the jury first on the theory that some recovery at least could be had under the contract, and subsequently changed his rulings, and held there could be no such recovery.

Some objections were made to rulings on the trial. Among others, errors are assigned on the reception of testimony of House's estimate made in 1879. We can see no reason why this was not proper. We cannot pass on the weight of disputed facts, but there was evidence connecting this with a final estimate of logs and shingles furnished that year. The further objection that he could not estimate, nor plaintiff recover for, less than 100,000 at a time, is not well taken. It could hardly be possible that logs cut would result in any exact multiple of 100,000; and plaintiff could recover for all that he furnished. And, as already suggested, the testimony is not for us, but for the jury to weigh it; and as their verdict is in favor of plaintiff's showing throughout, and against defendant's showing, we cannot lose sight of this in examining the errors assigned.

It cannot justly be claimed that plaintiff had no right to rely on House's statements. He was the sole referee, and the only person who knew the exact state of the account, and he was for that purpose the common agent of both parties. His denials as a witness could not be conclusive against the testimony of other witnesses. We cannot find any admission or rejection of testimony which defendant could object to as illegally ruled on to his prejudice.

We have searched the record, and cannot find any part of plaintiff's claim that was not admissible under the contract, and do not quite understand on what principle the charge was so changed as to hold otherwise. The shingles furnished in 1879 were mostly sawed from inspected logs, and approved

Digitized by Google

by House. A few thousand, not exceeding in value $10, were sawed from logs not inspected. But if they passed House's inspection, and came from the proper land, this could not be material. The rest were sawed by Davis and Porter, but the contract does not require any particular person to saw them. If it did, it would have been Anderson, and not plaintiff. The only important thing was that they should pass approval in size and quality.

The only question left in doubt is whether the statute of limitations cut off all but payment for the shingles and lumber furnished in 1879. The court below took the view that, if anything was done and accepted in 1879, it left plaintiff at liberty to recover all arrearages. The only item so recovered was a balance of $197 withheld by Chubb on the pretext that shingles furnished in 1877 were defective. It is not claimed that House did not approve those shingles, or at any rate the finding of the jury is otherwise.

There was testimony tending to prove that the whole business under the contract was figured up by Mr. House in 1879, and ascertained as an entirety. If the shingles and logs furnished in 1879 were delivered under the contract, the charges asked by defendant's counsel admit that the action was not barred, and we can see nothing in the case to the contrary. But under the charge given, which left the jury to find the amount due by value as not earned under the contract, the case would not be different. The contract price is the only price or value shown, and it was shown payments had been made on that basis. This being so, and the transactions having been continuous, and if, as plaintiff claims, he had not been fully paid up previous to 1879, there was nothing to set the statute in motion. The real controversy seems to have turned almost entirely on this question of limitations, upon which the court charged properly, and the verdict cannot be disturbed on account of it. Reduced to

Digitized by Google

its true issues, the record is not complicated, and we see no reason to think the jury has not dealt with it properly.

The judgment should be affirmed.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. MORSE, J., did not sit.

---

68 523
91 260

OLUF A. THORSEN v. SIMEON BABCOCK AND MICHAEL ENGELMANN.

Negligence—Special findings of jury.

1. It is a familiar and necessary rule of law that the only negligence which creates responsibility is that which has caused the mischief done, and there is always danger that redundant charges, if allowed to be proved, will not only confuse the *real* issues, but may, and generally do, lead to convictions not based on the *real* charge.
2. In this case the answers of the jury to the special questions submitted to them are held to *negative*, not only the *case* made by the declaration, but also any agency of defendants in plaintiff's going into the place of danger where he received the injuries complained of, and to have entitled defendants to judgment on such special findings. An examination of the entire opinion is essential to a correct understanding of the case.

Error to Manistee. (Judkins, J.) Argued October 20, 1887. Decided March 2, 1888.

Case. Defendants bring error. Reversed. The facts are stated in the opinion.

Ramsdell & Benedict, for appellants.

Smurthwaite & Glassmire, for plaintiff.

CAMPBELL, J. The plaintiff, who, at the time of the

Digitized by Google

injury he received, was twelve years old, sued defendants for the loss of his arm in November, 1886. The injury occurred, so far as the record explains it, in this way: Defendants own a shingle-mill in Manistee. Connected with it is a sawdust carrier, by which the sawdust and small refuse are carried by an endless chain arrangement into a room constituting a large box or bin on the outside, with a hopper or trap-bottom through which the sawdust thrown into the box is dropped into carts to be removed as fast as a load is ready to be dumped. This carrier came into the north-east corner of the box, revolving about an iron shaft three feet long between the bearings, as shown by the scale; one bearing being on the east side in the frame of the box and the other being on a cross-beam running across the box from the mill side on the north to the front on the south. The carrier extended in a trough about four feet, including the outer limit of the wheels or pulleys, which seem to be about a foot in diameter. The gudgeon where it reached its bearing on the cross-beam was held in place by a collar, apparently about six inches in diameter, fastened on the shaft by a set-screw, the head of which projected from half an inch to an inch above the rim of the collar, according to plaintiff's witnesses, and rather less according to some others.

Plaintiff usually entered this box (where he was employed in keeping the sawdust from piling under the carrier) by a hole in the west end, not very far from the bottom. This hole he sometimes closed to keep the wind out. The trap, opened to let out the sawdust, was in the middle of the front, which seems to be about 10 feet wide; the box being a foot or so narrower the other way. The pictures and plans in the record show some other openings in the upper part of the box, one at the east end opening on a roof, which was used when plaintiff came for signaling, and one of considerable size west of the middle of the box, caused by a board being blown off while plaintiff was there, from which plaint-

Digitized by Google

iff testifies he looked out to signal the cartmen to take away the sawdust, which was dropped into their carts through the trap opened for that purpose from the outside.

Plaintiff was employed in July, 1886, and his duty was, by means of a long stick with a hook upon it, to keep the sawdust spread out so as not to pile up high enough to get caught by the carrier on its return to the mill. The sawdust thus dropped into the sloping bottom, and when enough accumulated the load was dumped into the cart below.

On the fifteenth of November, after he had been working there four months, plaintiff, for some purpose, got up on the cross-beam, on which the end bearings of the carrier shaft revolved upon a raised block, and walking or in some way passing along there, or slipping and falling,—for there is some obscurity on this point,—his coat became entangled on the shaft, and, as is claimed, was caught by the revolution of the collar and raised set-screw head so that he was drawn down until his arm was caught, and was carried round some four revolutions, when his coat gave way and he fell off into the sawdust below, having his left arm so badly broken that it had to be amputated at the shoulder. His cries drew attention to him, and he was taken out at the bottom of the box, through which he had run his legs, but was unable to get out without lifting, which was done by two men engaged about the mill.

The theory of the suit was that plaintiff had been injured by the fault of defendants, the mill-owners, and not by accident or by his own conduct outside of his duty. The declaration set out several items of what was relied on to make out the fault of defendants. The jury found a verdict for plaintiff, with several special findings that are claimed to negative plaintiff's cause of action as averred. And it is claimed, further, that the testimony apart from the finding does not support the alleged cause of action. In one form or another the burden of the charge was that plaintiff was

Digitized by Google

injured in the discharge of his duty by causes which defendants were legally bound to prevent.

The declaration sets out at considerable length a good many duties, and what are claimed to have been violations of them. This is well enough perhaps as a recital, but it is a familiar and necessary rule of law that the only negligence which creates responsibility is that which has caused the mischief done, and there is always danger that redundant charges, if allowed to be proved, will not only confuse the real issues, but may, and generally do, lead to convictions not based on the real charge. The present case to some extent illustrates the danger, as time was spent on side issues unprofitably, and the jury, by their own statement in open court, could not reconcile the allegations and the proofs. It may, however, be proper to point out some of these allegations, all of which were allowed to go to the jury as real issues.

After setting forth in a general way the alleged duty to provide a safe place of work accessable to succor, and to provide safe machinery properly guarded, and to avoid exposing plaintiff to danger which he could not be expected to guard against, the declaration set out in what manner this duty had been disregarded.

It set forth first that plaintiff was required to pull away sawdust and shavings from the carrier, the construction of which was described specifically, and referring to the crossbeam on which the shaft rested as near the hole for signaling the drivers, and it further gave a general description of the way in which the sawdust was dumped. It then proceeded to set forth what was required of plaintiff in this way:

"The services so required by said defendants of said Oluf A. Thorsen, at the time aforesaid, were to climb up the side of said mill and enter said box near the lower side thereof through a small hole, there being no means whatever of enter-

Digitized by Google

ing or leaving said box other than the trap-door aforesaid, and the place where the said Oluf A. Thorsen was required to enter the same as aforesaid; and when the said Oluf A. Thorsen was within the said box he was required to close up the said small hole in the said box to prevent the said sawdust, shavings, and refuse from running out thereat, thus placing him alone in his employment, and beyond the reach and assistance of any person whatever; and by reason of the negligent and improper construction of said box, the said trap-door being fastened and opened only from the outside, and there being no other opening therein, there was no means of escape for the said Oluf A. Thorsen from said box, or from any danger that might arise therein."

It then sets out that, by reason of the negligent construction of the box, none of the employés of the mill could see him or hear any outcries he might make.

The next series of allegations state that he was required, in order to prevent the carrier from dragging back the sawdust, etc., to pull it away and scatter it in the box till nearly full, and till this stuff was higher on all sides of the box than where the carrier deposited it, and then to climb up to the cross-beam, back of where the shaft revolved, that being the only place where it was possible for him to reach the cross-beam, and then proceed along that beam over the place where the shaft revolved, and over and past the collar, and up to the front of the box to the signaling hole, and there to signal the carts, and wait on the beam till they had opened the trap and emptied the box and fastened it up again, when he would get down and proceed as before. It then averred that the machinery was not covered or protected, and no means were provided for climbing to the beam except the braces and timbers of the box, which made it dangerous. It further averred that the set-screw was improperly allowed to project two inches, and was dangerous.

These being the acts of negligence relied on, the declaration went on to describe the injury as occurring in this way: That plaintiff, having pulled away the sawdust, shavings,

Digitized by Google

and refuse until said box was full and sloping towards said sawdust carrier, so that he was in great danger of slipping down into the same, proceeded with care and diligence to climb over said sawdust, shavings, and refuse, and up the side of said box to the said cross-beam, and thence along the same to the signaling hole, for the purpose of signaling the carts, and when over the collar and set-screw, the screw projecting and revolving caught in his coat and became fastened therein, and immediately began to wind the coat on the shaft till it reached his left shoulder, and began to wind up *his* left arm, which was broken and mutilated, and whirled him around until he was disentangled by his feet striking the box. It is then averred that he cried out as soon as entangled, but by reason of the improper construction of the box no one could hear him, and had he been heard no one could have helped him, as the box was full and could not be entered without emptying it through the trap-door.

The immediate mischief is, by these allegations, reduced to this state of facts: That plaintiff had placed the sawdust in such a condition that the only place of entry was blocked up, and the box was full and sloping down towards the carrier with danger that plaintiff would slide into it; that it became necessary to climb over this heap and climb up on the cross-beam behind the shaft, and cross the shaft and revolving collar; and he was caught by the set-screw while doing so and hurt. As matter of further aggravation it is claimed that he could not be heard, and if heard could not be reached until the box was emptied by the trap-door; and his youth is also insisted on as requiring more care in his employment.

When the case went to the jury it was claimed that no cause of action was made out by the proofs; and certain questions were submitted to and answered by the jury, which it is claimed entitle defendants to judgment.

When the proofs were closed the matter was very much narrowed down, and the real questions of negligence became

Digitized by Google

very limited, although they were not separated as they might have been. There is no testimony that either the box or the machinery differed in any respect from what is usual, or involved any special risks, or that any safer methods were feasible. Except for the alleged necessity of plaintiff's continually climbing up and passing over the revolving shaft, there was nothing to create peril. There could have been no risk except in passing over the cross-beam at the spot where the shaft and collar revolved, and that was the only thing which, according to the testimony, had any bearing on the injury suffered. Plaintiff's cries were actually heard, and there is nothing to indicate that it would have been possible to rescue him sooner after he was caught by the machinery although it was not impossible to enter the box.

Looking at the testimony it appears that there was no occasion for the plaintiff to go upon that beam as he did unless he chose to. The hole which he signaled from, which was reached by him on the beam, was not the one provided by defendants for that purpose, but was made by a board accidentally blowing off. The signaling place used by his predecessor and by himself until the board blew off was different, but with the record unexplained it is somewhat difficult to understand all of the testimony on this subject, or precisely what difference this made. But it appears from his own testimony that there was no occasion to signal until a load had accumulated in the box, and that at the time when this happened there was but a small quantity gathered, and it would have taken half an hour to fill up sufficiently for that purpose. Until this should be done, his place was at the western end of the box, where it was his duty to be, and rake off the dust as it fell from the carrier, so as to keep it from piling up where it fell. There was testimony of another boy, who plaintiff says was at the open end of the box when he was caught by the shaft, but who gives a rather different account; that he was idling and sitting down on the cross-beam over

Digitized by Google

the shaft. His own testimony shows that he was there when he had no business there.

Unless he was there under the circumstances alleged in the declaration, and was also required to be there, the case alleged is not made out either formally or substantially. But the undisputed testimony supports the findings, and shows that he was not.

The jury, after being out for six or seven hours, came in and announced that they could not agree, and that the reason was they could not get the declaration and the testimony together. This was substantially an indication that plaintiff's case was not made out. The court, however, sent them back with very strong urgency for an agreement before the next morning, and with the statement that they must stay together until they did agree. This, however, was probably meant to be simply till the court met at 9 the next morning. The jury during that time agreed on a sealed verdict for plaintiff, and were discharged. In answer to special questions they found as follows:

1. That plaintiff was not required to close up the hole where he entered in the west end.

2. That this hole and the trap-door were not covered so as to afford no means of communication with the box.

3. That plaintiff had no orders from defendants or their foreman to climb up and walk along the cross-beam, where the shaft revolved, to the hole in the front of the box, to signal drivers when the box was full.

4. That when the box was nearly full he could not reach that hole without going on the beam over the shaft and collar with its set-screw.

5. That the box was not full, so as to create any danger of slipping down towards the carrier.

In view of what has been already said these answers negative, not only the case made by the declaration, but also any agency of defendants in plaintiff's going upon this place of danger at any time. His own testimony is not very far from

Digitized by Google

the same effect, and the jury could hardly have found otherwise.

This being so, defendants were entitled to judgment in their favor on the special findings.

Judgment must be reversed, and judgment rendered here accordingly.

The other Justices concurred.

JOHN HURLEY AND TIMOTHY HURLEY v. SAMUEL C. WATSON.

Principal and agent—Extent of authority—Duty of party dealing with agent—Application of agent's private debt upon account of principal—Ratification—Knowledge of owner of books of account as to their contents.

1. A person who deals with an agent is bound to inquire into the *extent* of his authority, ignorance of *which* is no excuse.
2. The authority of an agent to collect money for his principal does not authorize him to receive anything but money in payment from the debtor.
3. The carelessness of the principal in reposing confidence in his agent does not make him liable to a third party who, in dealing with such agent, fails to exercise the diligence usual with good business men under the circumstances.
4. A party dealing with an agent who has *general* authority to sell goods or collect debts is bound to know that he has no authority by virtue of his agency to apply or offset his *private* debt to such *third* party in payment of the debt of the third party to the principal; and, if this is done, *he* takes upon himself the burden of showing an *express* authority in the agent, or ratification by the principal.
5. There can be no ratification of the act of an agent without full knowledge of the *facts* which it is claimed are ratified.
6. *Knowledge* on the part of a firm of coal dealers that a clerk had for more than seven years been in the habit of applying his rent

68 531
92 122
68 531
97 180
68 531
109 551
68 531
836NW 726
130 257
68 531
141 92
68 531
145 231

Digitized by Google

and other claims due from him to his landlord on account of coal purchased of said firm by the landlord, during which time no objection was made by said firm, amounts to a ratification of such unauthorized course of dealing.

7. A person is presumed to be cognizant of the contents of his books of account, but the probative force of such presumption may be strong or weak, as the circumstances may show that the party made the original entries, or that they were made by a clerk or book-keeper, and may be entirely overcome and disproved by the positive uncontradicted testimony of the party that the accounts were kept and entries made by such agents, and had never been examined by him, and that he had no knowledge thereof.

8. It is generally a question for the jury whether silence affords a reasonable presumption of ratification under the circumstances of the particular case, and it will depend very much upon the question whether the party dealing with the agent had reason, from the course of previous dealings, or from the circumstances of the case, including the fact that the principal had notice or knowledge of the assumed authority of the agent in the dealings, to suppose that the principal would inform the party if he intended not to ratify the act, and whether his delay and silence, after such notice or knowledge, are or are not a fraud upon the other party.

Error to Wayne. (Chambers, J.) Argued January 4, 1888. Decided March 2, 1888.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

William F. Atkinson, for appellants.

Edwin F. Conely, for defendant.

CHAMPLIN, J. Plaintiffs were copartners, doing business as coal dealers under the firm name of J. & T. Hurley, in the city of Detroit.

They had in their employ for several years one P. J. Clark. The defendant is a druggist, and had rented a house to Clark. In the summer of 1879 Clark requested defendant to purchase coal from him. He consented to do so, and from that

Digitized by Google

time dealt with Clark. The coal was delivered by plaintiffs' teams, and the firm name was painted upon the boxes of the coal wagons. Defendant also gave receipts to those delivering the coal, which acknowledged the receipt of the coal from J. & T. Hurley. Clark's name nowhere appeared upon the receipts or bill-heads of the firm. Clark also traded with defendant at his drug-store upon credit, and at Clark's request the rent and account due to defendant were credited upon the account due from defendant for coal, so far as such credit went, and the balance he paid to Clark in cash. These dealings ran through a course of more than seven years, during which time several settlements were had and balances adjusted. Defendant knew the business in which plaintiffs were engaged, and knew that Clark was employed in their office, but did not know exactly in what capacity, or the nature or extent of his authority. He supposed him to be a general manager, from what he had observed of his transacting business.

One day Clark left the office of his employers and never returned. On looking over the books of the firm they found what appeared to be a balance due from defendant for coal, amounting to $110. Mr. John Hurley presented this bill to defendant for payment. Defendant denied owing that amount, and claimed he only owed for two tons of coal then recently purchased. In the course of the conversation between Mr. Hurley and defendant, Hurley was informed that the indebtedness of Clark to defendant for rent and drugs had for more than six years been applied as payment on the coal he had purchased through Clark. This was the first intimation or information the members of the firm had received of such fact. They thereupon commenced this suit to recover over $500 for coal delivered to defendant by Clark, from their coal-yards.

The extent of Clark's authority is not definitely settled by the testimony. It appears that he was for many years chief

Digitized by Google

clerk in the office of the firm, and had general control of the books; made most of the original entries in the day-books; assisted sometimes in posting accounts into the ledger; received money in payment of bills at the office; made out bills; collected bills at the office; took orders for coal, and settled with customers. He had no express authority to turn or apply his individual debts upon debts due the firm. And defendant, from first to last, never made any inquiry of Clark or of any member of the firm, although he met them frequently, as to the nature or extent of Clark's authority, or as to whether he was authorized to apply the rent and account due from him to defendant upon the indebtedness of the defendant to the plaintiffs for coal.

It also appears that the men in the employ of the firm were paid as often as once each month in full for wages, including Mr. Clark; and these payments were kept upon the time-books, and were not posted into the ledger.

It also appears that Clark kept an individual account upon the firm ledger, in which the items credited to defendant on account of rent and drugs were charged to him. In this account there is one item of $100 posted to his credit for wages.

The plaintiffs claim that they never discovered this account upon their books; that they had entire confidence in Clark's honesty and integrity, and never had examined their books, and did not know what they contained; that their time and attention were required and given to the handling of the coal at the docks and yards, and overseeing the laborers employed, and in looking after their teams; that they had from 75 to 80 men in their employ, and were doing over a quarter of a million business a year, and had no time to examine the books, and no inclination to, as they supposed their book-keepers were honest.

These are the main facts in the case, which were submitted

Digitized by Google

to the jury under the charge of the court, and they returned a verdict upon the disputed items for defendant.

The errors assigned are upon the refusals of the court to charge as requested, and upon the charge as given, and are as follows:

"1. The court erred in refusing to direct a verdict for the plaintiffs, as requested by plaintiffs' attorney at the close of the testimony.

"2. The court erred in refusing to charge the jury, as requested by plaintiffs' attorney, 'that it was the duty of Mr. Watson, when Mr. Clark offered to turn the account of Hurley Brothers on Clark's private account, to inquire of Hurleys whether Clark had authority to do so, and that he had no right to assume that the Hurleys knew or approved of Clark's paying his private debts with their bill; and that it was the business of Mr. Watson to inquire into his agency; and that the act of his in not doing so does not form any justification in the matter.'

"3. The court erred in refusing to charge the jury as requested by plaintiffs' attorney, 'that any person dealing with a clerk, and paying a bill to a clerk, from any store (even though the bill be made upon the letter-head of the firm, and the party paying it knows that the clerk is employed by the firm), is not authorized to pay that clerk unless the clerk has been authorized to collect it, and he is only authorized to pay it in the manner in which the clerk is authorized to collect it.'

"4. The court erred in charging the jury: 'It is for you to say, from the evidence, whether the Hurleys caused Watson to believe that Clark's dealings with Watson were sanctioned by them. If you should find that Watson did so believe, and in good faith dealt with Clark, then the Hurleys are estopped from denying the validity of Clark's action in the matter, if you believe they knew of it.'

"5. The court erred in charging the jury: 'It is for the jury to consider in this case whether the conduct of the Hurleys themselves did not cause Watson to be placed in the position in which they find him, when they asserted their claim against him; and if you believe that the Hurleys, by exercise of reasonably prudent supervision or oversight over their business and their subordinates, would have seasonably known or discovered Clark's dealings with Watson, as they appear to have been transacted, and that through their lack

Digitized by Google

of such supervision or oversight they failed to know or discover the same, the Hurleys should be treated as having known and approved of Clark's dealings with Watson from the time when, by the exercise of such supervision, they would have known or discovered it.'

"6. The court erred in charging the jury: 'Clark's position with the Hurleys, and dealings and settlements between Clark and Watson, occurring as they did, the lapse of time ensuing without complaint or objection by the Hurleys, and the settlements between Clark and Watson having been recorded, if you find they were recorded, as they appeared from time to time, according to the books of the Hurleys, to which they could have full and complete access, and which were in ordinary use in their business, raise the presumption that the Hurleys knew and sanctioned such dealings and settlements. It is not conclusive, but it raises the presumption.'

"7. The court erred in charging the jury: 'The burden is upon the Hurleys to establish the invalidity of the dealing. The presumption that the Hurleys knew of and approved of the transactions between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them, if the jury are satisfied from the evidence that the Hurleys did not exercise reasonably prudent supervision or oversight over their business, and thereby failed to know or discover the course their own affairs were taking.'"

The law is well settled that a person who deals with an agent is bound to inquire into his authority, and ignorance of the agent's authority is no excuse. The authority of an agent to collect money for his principal does not authorize him to receive anything but money in payment from the debtor. The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party who, in dealing with such agent, fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation. As illustrated by Mr. Wharton, in his work on Agency, § 137, wherein he says:

Digitized by Google

"I may be careless in exhibiting confidence in an agent, yet this does not make me liable to a third party who, in dealing with such agent, fails to apply the diligence usual with good business men under the circumstances. The case becomes, in such a view, one of what is called 'contributory negligence;' in other words, the casual connection between my negligence in giving color to the employment of A., and B.'s loss by dealing with A., is broken by B.'s own negligence in trusting A. without due inquiry."

The duty of the defendant to make inquiry in this case, notwithstanding the apparent general management of plaintiff's business by Clark, is conclusively established by another well-recognized principle of law, and that is, that a party dealing with an agent who has general authority to sell goods or collect debts is bound to know that the agent has no authority by virtue of his agency to apply or offset his own private debt to such third party in payment of the debt to the principal. *Whitney v. Bank*, 7 Wis. 620; *Butts v. Newton*, 29 Id. 632; *Rodick v. Coburn*, 68 Me. 170; *McCormick v. Keith*, 8 Neb. 143; *Sykes v. Giles*, 5 Mees. & W. 645; *Hart v. Hudson*, 6 Duer, 294; *Scott v. Irving*, 1 Barn. & Adol. 605; *Catterall v. Hindle*, L. R. 1 C. P. 187; *Greenwood v. Burns*, 50 Mo. 52.

No overweening confidence of the principal in the agent can excuse the duty of the third party to ascertain whether the agent has authority from his principal to pay the agent's debts in that way. It is presumptively a violation of the agent's authority, and a fraud upon his principal, and the party collecting his debt from the agent in that way participates in the fraud, and cannot shield himself behind any presumed or implied authority of the agent, because none exists in such case. The party so dealing takes upon himself the burthen of showing an express authority in the agent, or ratification of the transaction by the principal.

It is not pretended that there was any express authority given by plaintiffs to Clark to apply the rent and account

Digitized by Google

due from him to defendant in payment for coal due from defendant to plaintiffs. There can be no ratification of an act of an agent without full knowledge of the facts which it is claimed are ratified. There was no evidence that plaintiffs ever had any knowledge of the dealings between defendant and Clark until after Clark left their employment. The first information the plaintiffs claim to have received was from defendant after the dealings in controversy had ceased.

But it is claimed on behalf of defendant that plaintiffs must be held to have had knowledge of the contents of their books of account, and that the fact that those books contain an account with defendant for coal purchased from time to time from 1880, and credits therefor, so that a small balance only remains due to plaintiffs by said account, and the further fact that those books contain an account wherein Clark is charged with the amount collected of defendant, are evidence from which the jury may infer that the plaintiffs knew of the manner of dealing between Clark and defendant, and, not objecting to such dealing, it may be further inferred that they intended to and did ratify the same. Both of the plaintiffs testified positively that they never knew that such accounts stood upon their books before Clark left, and that they had never examined their books of account. The circuit judge instructed the jury that—

"Clark's position with the Hurleys, the dealings and settlements between Clark and Watson occurring as they did, the lapse of time ensuing without complaint or objection by the Hurleys, the dealings and settlements between Clark and Watson having been recorded, if you find that they were recorded, as they from time to time occurred, in the regular book of the Hurleys, to which they could have full and daily access, and which were in ordinary use in their business, raise the presumption that the Hurleys knew and approved of said settlements. It is not conclusive, but it raises the presumption. You should take into account all the other testimony, and arrive at your own conclusion from the whole.

"The burden is upon the Hurleys to establish the invalidity of the dealing. The presumption that the Hurleys knew

Digitized by Google

of and approved of the transactions between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them, if the jury are satisfied from the evidence that the Hurleys did not exercise reasonably prudent supervision or oversight over their business, and thereby failed to know or discover the course their own affairs were taking. You have heard all the facts, gentlemen.

"Counsel have embodied requests in writing, and I do not desire to comment upon the testimony. Take all the testimony in the case into consideration, Mr. Hurley's testimony regarding his knowledge of what was going on, and all the transactions and presumptions that he should have known, and in the ordinary course of dealings, if you believe his books contained the record of them, all the facts and circumstances together, as I have expressed it, and give it that careful consideration which it deserves, and your verdict will no doubt be satisfactory."

If the plaintiffs knew of the manner of dealing between Clark and Watson, and kept silent and suffered it to go on without objection for the length of time shown in the testimony, the jury would have been warranted in finding that they had ratified that course of dealing. But there must be evidence tending to prove such knowledge. There is a presumption that a person is cognizant of the contents of his own books of account. The probative force, however, of this presumption, may be strong or weak, as the circumstances may show that the party made the original entries, or that they were made by a clerk or book-keeper, and may be entirely overcome and disproved by the positive testimony of the party, uncontradicted, that the accounts were kept and entries made by a book-keeper or clerk, and had never been examined by him, and that he had no knowledge thereof. As was said by Mr. Justice Daniel, in *Fresh v. Gilson*, 16 Pet. 330:

"Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from acquiescence in those acts. But presumptions can stand only whilst they are compatible with the conduct of those to

Digitized by Google

whom it may be sought to apply them, and, still more, must give place when in conflict with clear, distinct, and convincing proof."

The circuit judge erred when he instructed the jury that—

"The burden is on the Hurleys to establish the invalidity of the dealing."

This is apparent from the principles above laid down relative to the duty of one dealing with an agent. He also erred in charging the jury that—

"The presumption that the Hurleys knew of and approved the transaction between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them."

Under the circumstances of this case, there is no ground for saying that plaintiffs are estopped by their negligence in not exercising a more vigilant supervision and oversight over their business, and thereby failing to discover the course their own affairs were taking. Their negligence did not excuse defendant from ascertaining whether Clark was authorized to pay his own debts in the coal of plaintiffs, or justify the defendant in participating in so palpable a breach of duty on the part of the agent. The proofs show that plaintiffs knew that the defendant was dealing with them, but there is nothing to show that they had any notice that such dealing was other than in the ordinary way. The proofs also established the fact that the plaintiffs paid their men regularly twice a month, including Clark. What, then, was there to raise a suspicion in their minds that Clark was charging coal sold to defendant to his own account upon the books of the plaintiffs?

The burthen of proof was upon the defendant to show ratification; and generally it is a question for the jury whether silence affords a reasonable presumption of ratification under the circumstances of the particular case, and will depend very much upon the question whether the party deal-

Digitized by Google

ing with the agent had reason, from the course of previous dealing, or from the circumstances of the case, including the fact that the principal had notice or knowledge of the assumed authority of the agent in the dealing, to suppose that the principal would inform the party if he intended not to ratify the act, and whether his delay and silence, after such notice or knowledge, are or are not a fraud upon the other party.

In this case the record does not disclose in what manner defendant was defrauded by the silence of the plaintiffs, even if it should be conceded that they had notice and said nothing. It is to be presumed that defendant bought no more coal than he needed for use. It is not shown that he paid a larger price for it because he could turn it upon account against Clark in the way he did. It does not appear that Clark has absconded, or that he was or is insolvent. Defendant testifies that he would as soon have paid the money for the coal, and offered to do so, but that Clark suggested to apply it upon rent due from him to defendant. If Clark had no authority to receive anything but cash in payment for coal sold to defendant, and defendant is now obliged to pay plaintiffs for such coal, Clark's debt to defendant is not discharged. He is still liable, and the defendant, so far as this record discloses, loses nothing. It is not like the cases where the principal has received a benefit from the transaction which he retains, and where he will not be permitted to repudiate the authority after accepting and retaining the benefit derived from the transaction.

The judgment must be reversed for the errors pointed out in the charge of the court, and refusal to charge as requested by plaintiffs, and a new trial granted.

SHERWOOD, C. J., and LONG, J., concurred.

MORSE, J. I think this judgment should be affirmed.

CAMPBELL, J., did not sit.

Digitized by Google

WILLIAM G. BLISH v. BENJAMIN Y. COLLINS ET AL.

Fraudulent conveyances—Evidence—Inadequacy of price—Dealings with relatives—Proof of fraud—Bill in aid of execution—Lien of creditor.

1. Upon a review of the case, the decree of the circuit judge dismissing complainant's bill is affirmed.
2. The dealings of an insolvent debtor, in property, with his relatives, have no necessary connection with fraudulent transactions; such relationship being a circumstance calling for closer scrutiny of such dealings, and may always be shown in evidence for that purpose.
3. Great inadequacy of price is important evidence to show fraud in the conveyance of property by an insolvent debtor, varying, however, with the circumstances of each case.
4. The circumstances should be such as to amount to clear proof before a party can be held liable for fraud; and the inferences to be drawn therefrom must not only be consistent with the fraudulent acts charged, but inconsistent with the theory of honesty and good faith in the transaction.
5. "Unless the creditor has a *certain* claim upon the property of the debtor, he has no concern with his frauds."

Appeal from Berrien. (Pealer, J., presiding.) Argued January 4, 1888. Decided March 2, 1888.

Bill to set aside alleged fraudulent conveyances. Decree dismissing bill affirmed. The facts are stated in the opinion.

O. W. Coolidge, for complainant.

David Bacon (*Clapp & Bridgman*, of counsel), for defendants.

SHERWOOD, C. J. On the ninth day of April, 1883, the complainant obtained a judgment in the circuit court for the county of Berrien, for the sum of $564.66, against the defendants William B. Collins, William J. Carey, and Ben-

Digitized by Google

jamin Y. Collins. Execution was issued thereon on the twentieth day of July, 1883, and was by the sheriff of said county duly levied upon four parcels of land claimed to be the property of defendant Benjamin Y. Collins, who executed conveyances upon three of the same as follows: Upon one of said parcels said B. Y. Collins and defendant Helen M., his wife, made and executed a mortgage to secure the payment of the sum of $1,000 to the defendant Howell, on or before one year from date, and dated the sixth day of May, 1882, acknowledged the same day, and recorded on the fifth day of August thereafter.

The said Benjamin Y. Collins and wife also conveyed by warranty deed the second parcel to said defendant Austin R. Howland, dated the thirteenth day of May, 1882, and which deed was recorded on the tenth day of May, 1883. The consideration of this conveyance purports to be the sum of $800. This conveys two descriptions.

Said B. Y. Collins and wife further conveyed to the defendant Ruth W. Babcock, by warranty deed, for the expressed consideration of $1,400, the third parcel levied upon. Said deed was dated the twentieth day of May, 1882, and was recorded the fifth day of July, 1882.

The suit in which the complainant recovered his judgment in the circuit court was commenced by attachment on the twenty-seventh day of June, 1882, upon a claim made upon a promissory note for $500, and dated the thirty-first day of May, 1880.

As stated by the complainant's counsel, the bill in this cause was filed for the purpose mainly of having the three conveyances made by Benjamin Y. Collins and wife set aside and declared null and void, as fraudulent against the complainant, and to remove the cloud upon the complainant's levy under his attachment and execution, caused by the record of such conveyances, and which are subsequent to his liens under such levies, as he claims.

Digitized by Google

The bill sets forth the foregoing facts among others, and also avers that the sheriff made the levy upon the four parcels of land, which are entered upon the writ of execution as of the twenty-first day of July, 1883; said writ being dated the day before, and made returnable the second day of October following, and the third day of October, 1883, is indorsed filed with the clerk of the court, with the following return written thereon:

"STATE OF MICHIGAN, } ss.
County of Berrien, }

"No property found whereof to make the damages and costs; therefore I return the within execution unsatisfied, by order of plaintiff.

"JAMES R. CLARKE, Sheriff."

The complainant further avers by his bill, on information and belief, that defendant Benjamin Y. Collins, who was surety for the other defendants upon the note upon which the judgment was given, is abundantly able to pay all his debts, if he desired so to do, but that he conceals his property for the purpose of defrauding his creditors, and that he has money under his control to the amount of several thousand dollars, which cannot be reached by execution. And he further avers, that the above-mentioned mortgage made by him was without consideration; that the mortgagee was his uncle, residing in the state of New York; and that the mortgage was made for the purpose of defrauding the mortgagor's creditors, and after the issuing of the writ of attachment, and is void against complainant's levies; also that both of said deeds are fraudulent, and made without any consideration, and not until after the issuing of said writ, and with the intent to defraud complainant out of his debt; that said deeds and mortgage were dated back, and neither grantee in the deeds or the mortgage received said conveyances in good faith; that said mortgage was made without the knowledge of the mortgagee, and that the deeds were made with the knowledge of the grantees of the facts

Digitized by Google

which make them void. The remaining averments of the bill are those usual in the ordinary creditor's bill.

David Bacon was originally made a party to the bill, he being, as is alleged, the attorney who drafted the several conveyances, and attorney of all the defendants, and participating in the alleged fraud. The bill was, however, on coming in of the answers, dismissed as to him, and there is nothing showing him other than the proper legal adviser of the parties.

The defendants appeared, and, except B. Y. and Mrs. Collins, John Collins, and William J. Carey, all jointly and severally answered and fully denied all the fraud charged in the bill, as well as the main facts contained therein from which it is imputed, and each denies that he or she holds any property of Benjamin Y. Collins for his creditors or in trust for him, or that either of the conveyances were antedated.

Mr. Blish, Mrs. Babcock, John Collins, A. Howland, and B. Y. Collins, all parties to the suit, and three others, were sworn in the case on the part of the complainant. The defendants took no testimony.

The case was heard before Hon. Russell R. Pealer, circuit judge, on the pleadings and proofs, who made a decree dismissing the bill.

After a review of the case we are satisfied the circuit judge was correct in his conclusion, and that the decree should be affirmed. There is no proof in the case that the conveyances mentioned made by B. Y. Collins were not made and executed on the days they bear date. The mortgage to Howell was made the sixth day of May, 1882, the deed to Howland, on the thirteenth day of May, and the deed to Mrs. Babcock, the twentieth day of May, 1882. The complainant's attachment did not issue until the twenty-seventh day of June following; more than a month after the conveyances were made.

It is claimed the withholding of these conveyances for sev-

Digitized by Google

eral months from the record, after they were made, was a circumstance tending to show fraud. Certainly the grantors could not control the recording of them, and there is no statute requiring the grantees to record them. It was their privilege to record them or not, as they might choose. While it was competent to give the fact in evidence as perhaps explanatory of something else in the case, it is difficult to see how the want of record of these instruments could be made a circumstance of fraud. Usually parties obtaining conveyances of real estate for a fraudulent purpose seek to record the same at the earliest opportunity, instead of withholding them; and we think it may be safely said that it is rare indeed that such a conveyance is withheld for a fraudulent purpose. These parties live ten or twelve miles from the register's office, and Mrs. Babcock explains why her conveyance was not recorded earlier.

It is true, some of these defendants were related to each other, but that is but a circumstance calling for closer scrutiny of the dealings of the parties, and their relation may always be put in evidence for that purpose. The dealings of an insolvent debtor, in property, with his relatives, have no necessary connection with fraudulent transactions.

It is claimed that the inadequacy of price obtained for the real estate by B. Y. Collins is so great as to furnish strong evidence of the fraud charged against him. Inadequacy is unquestionably, when unusually great, important evidence to show fraud in such cases, varying, however, with the circumstances of each case; but no such evidence exists in this case. Mrs. Babcock says she invested in the basket factory property because she thought it was cheap, but there is no testimony showing that the cash value was greater than what she paid for it at the time she purchased.

The circumstances should be such as to amount to clear proof, before a party can be held liable for fraud. The inference to be drawn from them must not only be consistent

Digitized by Google

with the acts of fraud charged, but inconsistent with the theory of honesty and good faith in the transaction. And there is no satisfactory testimony showing the other considerations paid for property sold were greatly less, if any, than the cash value thereof.

It is claimed securities were taken for larger balances of purchase money than is consistent or usual in transactions of this kind. In one instance a mortgage was taken for $800 on a sale of $1,000, but it appears the purchaser was Benjamin's brother, and that Benjamin owed him at the time about $200, which was subsequently allowed upon the note, and which really, with the $200 paid when the purchase was made, reduced the security to $600. It does not appear, however, that the purchaser's note was not good for the amount without the mortgage. We see no evidence of fraud, or enough to raise a suspicion in this matter.

It is claimed that the deed to John Collins, a brother of Benjamin, and a farmer living out of the city of Niles, irrespective of fraudulent intent, should be set aside on the ground that he had not taken possession of the property conveyed to him in the city, by the deed, at the time of complainant's levy; that, the deed being unrecorded, the lien under the levy was prior thereto. We do not so construe the testimony as to the possession. There was no objection to Benjamin's holding possession of the property after he sold, for and as agent of John. This he did, according to the testimony, and which is not disputed, and such possession was evidence of John's title, and of which the sheriff was bound to take knowledge when he made his levy.

It is unnecessary to pursue the subject of fraud further in the execution of these conveyances. The evidence shows none, and they are not void as against complainant upon that ground, and the bill cannot be sustained upon that theory. Neither can it be sustained as a creditor's bill; indeed, not much is claimed for it upon that theory by complainant, and

Digitized by Google

his proofs are quite as unsatisfactory to sustain such a bill as they are to show fraud in making the conveyances referred to.

The most favorable construction that can be put upon the bill is that it is one in aid of execution, and the proofs all seem to be put in with a view of supporting such a bill; but in such a case a lien must have been acquired by levy of the writ, before conveyances and clouds could be removed to aid such legal process, and such lien must exist at the time the bill is filed. In this case it had been removed by direction of the plaintiff, nearly or quite a year before the complainant filed his bill. It is well said by Chancellor Kent:

"Unless he [the creditor] has a certain claim upon the property of the debtor, he has no concern with his frauds." *Wiggins v. Armstrong*, 2 Johns. Ch. 144. See, also, *McKibben v. Barton*, 1 Mich. 213; *Rhead v. Hounson*, 46 Id. 246 (9 N. W. Rep. 267); *Tyler v. Peatt*, 30 Id. 65; *Beck v. Burdett*, 1 Paige, 308.

There is nothing in the record upon which the bill in this case can be sustained, and the decree must be affirmed.

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

Digitized by Google

GEORGE F. ROBISON, PROSECUTING ATTORNEY OF WAYNE COUNTY, v. JOHN MINER AND EDMUND HAUG, POLICE JUSTICES OF THE CITY OF DETROIT.

[TWO CASES.]

Constitutional law—Liquor law of 1887—Title of act—Bond of dealer—Authority of municipal board to reject—Right of county treasurer to require new bond—Arrest—Breach of the peace—Penalty—Forfeiture of business.

1. The title to Act No. 313, Laws of 1887, namely, "An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented liquors, and vinous liquors, in this State," covers but one *general* subject-matter.

2. The following provisions of the liquor law of 1887 are held unconstitutional:

   a—Authorizing the approving board to reject a bond if the principal is known to them "to be a person whose character and habits would render him or her an unfit person to conduct the business of selling liquor."

   b—Authorizing the county treasurer to require new bonds "in any [other] contingency that he shall determine requires it."

   c—Allowing and directing various officers to close places of sale on their own determination of facts, and to arrest parties without process for a breach of the peace.

   d—Providing for the forfeiture of business in addition to fine and imprisonment.

3. The new taxes and penalties not involving the peculiar disabilities named are valid, as well as the new method of prosecution in the upper instead of justice's courts, and, except as pointed out, the law may be enforced.[1]

Application for *mandamus* to require respondents to entertain jurisdiction to hold preliminary examinations in criminal

[1] See *Luton v. Palmer*, 69 Mich. —— (37 N. W. Rep. 701).

68 549
69 613
68 549
70 499
68 549
73 9
68 549
80 650
68 549
85 121
68 549
86 177
68 549
89 103
68 549
91 97
92 394
68 549
96 198
96 204
68 549
101 420
101 427
68 549
106 602
68 549
107 572
68 549
111 32
68 549
141 98
68 549
d149 204
68 549
153 [2]119
68 549
f154 [1]321
68 549
j157 432
157 [2]459
157 [2]560

Digitized by Google

prosecutions under the liquor law of 1887. Submitted January 10, 1888. Granted as to Justice Miner, and denied as to Justice Haug, March 2, 1888. The facts are stated in the opinion.

George F. Robison, prosecuting attorney (*Edwin F. Conely* and *C. A. Kent*, of counsel), for relator.

Isaac Marston and *F. A. Baker*, for respondents.

CAMPBELL, J. The object of these two applications, one of which is made against each respondent, is to require them to entertain jurisdiction to hold preliminary examinations in criminal prosecutions under the revision of the liquor laws of 1887. They decline doing so upon the claim that the statute embodying that revision is invalid because, as they insist, it contains unconstitutional provisions, which are so connected with the prosecution clauses of the act that they must stand or fall together. If this defense is made out it will be fatal, and will defeat the application for our intervention. We are therefore required to consider it.

As none of the previous laws on the subject are repealed except by the general clause repealing all inconsistent statutes and parts of statutes, we are saved some discussion that might otherwise be required. The present statute covers the whole ground, and was meant to provide a full system of legislation to replace the old, and there are no important provisions in the old laws that are not more or less affected by the new one.

The act in question was approved June 28, 1887, subsequent to the act popularly known as the "Local Option Law," which must stand on its own merits as meant to apply by its terms whether the old or new law should be in force. That statute does not seem, therefore, to form any essential feature of this controversy, and we cannot properly consider it on this record.

Digitized by Google

The statute before us is entitled—

"An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented liquors, and vinous liquors, in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act."

Some question was made whether this title is not multifarious in covering distinct objects. But we see no such necessary difficulty in it. There is but one general purpose indicated by it, and that is to reduce to one system all dealings with liquors of every sort which include such varieties as may intoxicate, and while these varieties may be numerous, and may include some kinds which are not intoxicating, it would be difficult to make a title that would make that specific discrimination without verbosity, or without creating confusion. The regulation of such beverages as in the opinion of the Legislature need regulating has always been regarded as a single branch of policy, and it would not be difficult to make a shorter title which would cover all the ground covered by the title of the act in question. The object is clearly a single one, capable of subdivision in details. It may be possible to include in legislation on that matter provisions that would not fairly come within the title; and of course, under our Constitution, those provisions would have to be rejected. But the title itself is not open to this objection. It covers but one general subject-matter.

The present law combines together, but under new regulations, a number of matters which have been treated heretofore to a considerable extent under different statutes and amendments. It includes the rules of taxation which the Legislature have seen fit to adopt, and new methods of enforcement, and a considerable number of provisions changing the penalties and modes of arrest and trial, imposing various forfeitures not before imposed, transferring the litigation from justices' to the higher courts, giving new

Digitized by Google

power to officers, and in other ways making more stringent and severe regulations running through most of the parts of the law. It is largely in reference to the conditions and the penal methods and consequences that the law is complained of. The chief particulars of the complaints will be referred to.

The tax or license for doing business is considerably increased, and new conditions are imposed on the business. These changes or modifications involve, in regard to druggists violating the law in any way, a fine not less than $100, nor more than $500, or imprisonment not less than 90 days, nor more than a year, or both fine and imprisonment. In case of a second offense the person charged is, in addition to the other punishment, to be debarred from selling in this State any such liquors for five years. The liquors he is allowed to sell are confined to chemical, scientific, medicinal, mechanical, and sacramental purposes.

Other persons are to pay in advance the coming year's tax, ranging from $300 to $800, on payment of which a large and conspicuous printed notice, as well as a receipt, specifying the amount and purpose of the tax paid, and the place and conditions of business and the penalties, etc., of the act are to be furnished. This receipt and notice are to be kept conspicuously posted, so as to be manifest to all comers. A bond also is required to be fixed as presently noted. A failure in any of these particulars involves punishment for misdemeanor to the extent of $200 fine and 90 days' imprisonment, or either, and imprisonment up to six months if the fine is not paid. And it is further provided that any person doing business, who has paid his tax, if—

"Convicted of a violation of any of the provisions of this act, shall thereby, in addition to all other penalties prescribed by this act, forfeit the tax so paid by him or them, and be precluded from continuing such business for the remainder of the year, or time for which said tax was paid, and be debarred from again engaging in any business requir-

Digitized by Google

ing the payment of a tax under section 1 of this act, or from becoming a surety or sureties upon any bond required under section 7 of this act, for the period of one year from the time of such conviction. Each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense, and for each violation, on the same day or on different days, the person or persons offending shall be liable to the penalties and forfeitures herein provided, and be precluded and debarred from continuing or engaging in any business requiring the payment of a tax under this act as aforesaid. And it shall be the duty of sheriffs, marshals, constables, and police officers to forthwith close all saloons and other places where the business of manufacturing, selling, or keeping for sale any of the liquors mentioned in section 1 of this act is being conducted, upon which business the tax required by said section 1 has not been paid in full, and in which the receipt mentioned in section 5 of this act shall not be posted up and displayed."

It will be observed that by some mistake or otherwise reference is made to section 7 for a bond and to section 5 for a receipt. Those sections contain no such provisions.

Bonds are required of all dealers yearly of not less than $3,000, nor more than $6,000, to secure the public and others from illegal sales. The sureties are to be freeholders of the municipality, holding no office unless that of a notary public, and not sureties on any other bond, who are to justify as owners of sufficient real estate in the county, beyond debts and exemptions. The bond is to be approved by the municipal board or trustees or council upon affidavits. And if, in the judgment of that body, the sureties are inadequate,—

"Or if the principal of said bond is known by said township board, or the board of trustees or common council of the village or city, to be a person whose character and habits would render him or her an unfit person to conduct the business of selling liquor, they, the said township board or board of trustees, the council or common council of the village or city, as the case may be, shall refuse to indorse said bond with their approval."

A new bond shall be required by the county treasurer in case of the death, insolvency, or removal of either of the

Digitized by Google

sureties, "and in any other contingency that he shall determine requires it." Any sale contrary to this section is made a misdemeanor, punishable "as provided in section six of this act." Section 6 does not provide any punishment, but refers to other matters.

One-half of the tax moneys is to be retained by the county treasurer, in the general fund of the county, and the other half is to be paid over to the municipalities where it is collected, except in the Upper Peninsula, where all is paid over to the latter bodies.

By section 17 the hours of sale are limited, and sales on certain days are forbidden; and by the same section any person violating its provisions is declared guilty of a breach of the peace, and to be punished accordingly. It is further declared:

"And the arrest therefor may be without process, and this punishment shall be taken to be in excess of all other manner of punishment in this act provided for a violation of the provisions of this section. All officers authorized to make arrests for a breach of the peace shall have like power to make arrests under the provisions of this section as in other cases of a breach of the peace."

By section 18 all persons violating any of the five preceding sections are made guilty of a misdemeanor, and punished as provided by section 7. Section 7 contains the provisions for fine, imprisonment, forfeiture, and disabilities before referred to.

Section 24 makes principals liable for the acts of their clerks and servants.

There are special provisions against adulteration, and for removing all obstacles to seeing the interior of buildings during the hours of closing, and some other special and local provisions not necessary to be referred to now.

There is no question but that the statute contains provisions not capable of being sustained, as well as some that are inconsistent and imperfect. While the bond is fixed, or capa-

Digitized by Google

ble of being fixed, in amount, the statute allows the local body approving the bonds to refuse doing so to any person whose character and habits would render him or her an unfit person to conduct the business of selling liquor, and this is done on their supposed knowledge of the unfitness. Such a refusal may operate to the ruin of the applicant and a practical distruction of his business, and injury to a forfeiture of the enjoyment of his property cannot be avoided.

Where licenses are granted to limited numbers of people, it is sometimes provided that applicants shall present evidences of character in the place where they live; but it would be anomalous to allow any one to be disqualified from business and branded with disgrace, both of which are really heavy punishments, on the mere will of anybody. This law does not by its terms or intent operate as an ordinary license law limiting the number of vendors. It is general, anybody may sell whose bonds are accepted. If the law itself singled out any class or classes of persons as improper to be allowed to carry on this business, then the only inquiry would be as to the fact of any one belonging to the forbidden classes. But, in such a case, without an admission of it, the applicant would certainly have the right to some hearing on the facts, and to be assured a hearing which could be examined by some court in case of capricious abuse. The subject was somewhat discussed in *Dullam v. Willson*, 53 Mich. 392 (19 N. W. Rep. 112), where many cases were referred to, showing the right of accused parties to know what they are accused of, and to have a hearing which will give them means of fairly meeting the charges. Without this there can be neither fairness nor uniformity in the operation of the law. If no standard is laid down, there may be as many scales of fitness and unfitness as there are boards. We have already had occasion, under the old law, to discover that boards desirous of preventing liquor selling are ingenious in finding fault with bondsmen. There are very many excellent people who regard

Digitized by Google

every seller of liquor as a bad man, unfit for social privileges, and others who hold peculiar views on other topics, which would render them harsh censors. If the statute had fixed the rule, there would be means of protecting parties against caprice and condemnation unheard. But when the same persons are to be judges of the proper causes of rejection, as well as of the fitness of persons under such causes, the law subjects every one to the mere will of his neighbors, and gives him no rights whatever. No man's rights can be submitted, under a constitutional government, to the discretion of anybody. *Frazee's Case*, 63 Mich. 396 (30 N. W. Rep. 72).

The power in a county treasurer to require new bonds in any contingency which he determines should require it, is still worse, for it works a forfeiture of the rights obtained by paying the taxes imposed for the year's business, as well as the breaking up of the business. This cannot be done. The specified causes, so far as they go, are not illegally laid down, although the law is deficient in providing no method of getting at the facts by a hearing before any one. The treasurer is given such powers by this legislation as cannot be sustained on any legal principle.

The statute has made some stringent provisions concerning places of sale which of themselves indicate more or less of the dangers especially regarded, but it points out no classes of persons who may or may not be allowed to sell, and leaves the whole subject, so far as the provisions above referred to are concerned, to the unlimited discretion of the local boards and the county treasurer.

These provisions underlie the whole policy of the statute. It provides that no one shall sell except on the condition specified, and it leaves it discretionary with local boards to deprive any person of the right of selling on their private judgment as to his unfitness.

Another class of provisions coming clearly within the prohibition of the Constitution embraces those which allow and

Digitized by Google

direct various officers to close places of sale on their own determination of facts, and without process to arrest parties as for a breach of the peace.

The Constitution prohibits interference with persons or property without due process of law. The proceedings under this statute are all highly penal, and treated expressly as criminal proceedings. The Constitution expressly prohibits the issue of warrants of search or seizure of persons or property except on a sworn showing, which, it has always been held, must be of facts on personal knowledge such as would establish the legal probability of the cause of complaint. If the Legislature could evade this by providing for seizures and searches without legal warrant, the provision would be useless.

A somewhat similar question arose under one of the early prohibitory laws, which provided for searches and seizures under warrants issued by magistrates upon a sworn showing, but without adequate provision for notice or regular trial in the ordinary course of law, and this was held unconstitutional because no such action could be had except for the purpose of a criminal trial, or without full safe-guards against abuse of process. *Hibbard v. People*, 4 Mich. 125. The facts in that case were very far short of what is intended by this statute. Here the effect of closing a place of business, which may be done both without warrant and without trial, is to enable any irresponsible officer, of his own motion, to do what, if lawful at all, could only be so after final judgment.

So far as arrests are concerned, a similar principle applies. Under our system we have repeatedly decided, in accordance with constitutional principles as construed everywhere, that no arrest can be made without warrant except in cases of felony, or in cases of breaches of the peace committed in the presence of the arresting officer. This exception, in cases of breaches of the peace, has only been allowed by reason of the

Digitized by Google

immediate danger to the safety of the community against crimes of violence, and it was confined, even in such cases, to instances where the violence was committed in the presence of the officer. There are not many such cases. The common and statute law provide for very few specified breaches of the peace, and there are none that are not specified. An indictment charging a person as a peace-breaker, and not with any specified crime, would be good for nothing. Assaults and riotous conduct make up the largest part of the list. But there can be no breach of the peace within the meaning of the law that does not embrace some sort of violent as well as dangerous conduct. The manifest purpose of this statute is to bring certain things that are not breaches of the peace within that denomination to avoid the necessity of a warrant. But, as already suggested, the Constitution cannot be so evaded. The cases covered by the statute present some peculiar features. No doubt keeping open places of sale late in the evening may lead to breaches of the peace, and, when they actually occur in an officer's presence, arrest may be made for that. Most of the acts denominated breaches of the peace by this act are fixed after the regular closing hours at night. An officer arresting without process must, as soon as practicable, take his prisoner before the nearest magistrate, where he can be bailed, or examined, or put on trial, as the case may be. But the arrests provided for in this act would necessarily keep the parties arrested imprisoned until a magistrate could be found, and probably hold them in durance until the next day at least, and subject them to more than usual annoyance. Needless nocturnal arrests are among the greatest abuses which officers can practice, and where, as will sometimes at least be the case, there is no legitimate cause for accusation, and the officer is irresponsible, the wrong is very great and without any adequate civil remedy.

It was also held in a number of cases which have been

Digitized by Google

famous in history that no general warrants could lawfully issue at common law, and our Constitution has embodied that idea in very clear and express terms. But this statute is practically, if carried out, a general warrant itself, directing all officers to visit houses and business places without other authority, and make searches and arrests, and close up places of business on their own well or ill founded notion that the law has been violated.

It is a matter worthy of consideration, at least, whether the law is not equally defective in dealing with these arrests even if otherwise valid. It makes the breach of the peace punishable without being a bar to other regular proceedings for the same offense. But there is no punishment affixed by law to any undefined breach of the peace. Some of these acts are punishable by justices. Some are indictable felonies and misdemeanors. But a charge of breach of the peace, and nothing more, is not a definite charge, and the arrest made on such a charge could lead to no trial, and would come within the mischief of *Hibbard v. People*. There is no point of view in which these proceedings can be sustained.

It is also insisted that the law violates the constitutional rule of punishment, both as to severity and as to inequality. The fourteenth amendment to the Constitution of the United States forbids the enactment by any state of what will deprive any person within its jurisdiction of the equal protection of the laws, or deprive any person of life, liberty, or property without due process of law. These provisions have the double sanction of State and National Constitution, and are to be fairly applied, not alone, but in connection with other provisions. Our State Constitution declares that—

"Excessive bail shall not be required; excessive fine shall not be imposed; cruel or unusual punishment shall not be

Digitized by Google

inflicted; nor shall witnesses be unreasonably detained." Article 6, § 31.

Article 13, § 12, declares all fines collected for breaches of the penal laws to be devoted to school or library purposes.

While some of these provisions have not been much discussed in our day, it is chiefly because very little legislation has been put in force that called for it. There have always been laws on the statute book which might call for consideration, if attempts were made to carry them out. The practically unlimited power of parliament has prevented any such question being raised in Great Britain in modern times, and the few precedents that may be found in their statutes throw no light on a system designed to prevent such abuses as suggested it. But we have in all the great charters against oppression some provisions which were the origin of the more important clauses in our own bills of rights. Few, if any, of these were originated in those documents. The great charter and its successors, and the declaration and bills of rights of the seventeenth century, have always been treated as only declaratory of the common law, and not as new inventions. Our own people so regarded them in the manifestoes put forth by those congresses which met during the decade preceding the American Revolution, and in the Declaration of Independence, which set forth what were claimed to be violations of these common rights.

In order to compare the law in question with these rules, it may be well to point out in one view the punishments and consequences complained of. For every offense, small or great, under the law, there are fines and imprisonment provided for which in themselves are not relied on as incompetent. But for most of the offenses further consequences are made to follow on every conviction, and in some cases without any conviction. The statute leaves no discretion to any court on the subject.

Every person authorized to deal in any form with liquors

Digitized by Google

is held liable criminally for any acts or neglects of his servants. The first persons named are druggists, in whose business the law recognizes a necessity for the use of fermented and spirituous liquors for medical purposes, and allows a sale for some other purposes where it is regarded as equally necessary. Every druggist is, besides the limitation on the purposes for which he may sell, required to keep a full record of purchasers and purposes of purchase, open to the daily perusal of the entire public, and any single omission, intentional or accidental, subjects him to the penalties of the act, which in his case are prosecution for misdemeanor, subject to fine of not less than $100 nor more than $500, and imprisonment may be added of not less than 90 days, nor more than a year. For a second offense this statute debars the druggist for five years from making any sales of liquor for any purpose, as druggist or otherwise.

For other persons the general punishments and forfeitures are these: For engaging in business without the tax paid and bond given, or without posting up the receipt and notice mentioned in the law, the party is held guilty of a misdemeanor, subject to fine of not more than $200, and imprisonment may be imposed of not less than 10 nor more than 90 days, separate or additional, with further imprisonment till paid, not more than six months in all; and this applies to all violations of the act by such unauthorized persons or by any others. But those who have complied with the act and given bonds are subjected to still heavier consequences than those who have not. The law declares that, in addition to all other penalties provided by it, they shall forfeit the tax paid, which, for the various classes of business, is $65 for manufacturing brewed liquors, $300 for the sale of brewed liquors, $500 for retailing liquors generally, and $800 for general wholesaling and retailing, and for manufacturing liquors generally. The amount of this forfeit would make a very heavy penalty, and much heavier than any of the specific

Digitized by Google

penalties mentioned in the act for any offense whatever. In addition to the forfeiture of the tax and the other penalties, the offender is made incapable of continuing business for the rest of the year, and for one whole year after conviction, which may take place at any time not barred by the statute of limitations, and at any period of any year. There is a further disability created against becoming surety on any bond under the act for a full year after conviction. And the same section 7 makes it the duty of any officer to forthwith close all establishments where the proper card is not kept displayed. No saving clause is made for its loss or destruction without the owner's fault, and none for renewing it. This involves penal consequences of the most serious kind without charge or trial.

There are several passages in the statute which seem to indicate that it is in part made up of older laws confined to a smaller field, and inserted here without verbal changes so as to create some incongruities. Some provisions in regard to the adulteration of liquors have been so introduced. But there is no need of referring to them now.

The disabilities and other peculiar consequences before referred to are made obligatory and inseparable from every conviction. They may, and in some instances must, involve practical ruin to the offender. A druggist, cut off for five years from his business, may suffer a loss of immense sums, and so may any large manufacturer or large dealer by having his store shut up and his business barred. It not only must usually bring about bankruptcy, but it also includes what is meant to be an infamous disability,—to receive credit as a surety.

The great charter made it unlawful to impose any penalty or forfeiture which should deprive a man of what is translated his "contentment," or a person in any kind of business, whether commercial or otherwise, of the means of continuing that business. Seldom speaks on this subject with

Digitized by Google

some force in censuring the fines imposed in his time, which he says were in violation of this provision, and which led, among other things, to the bills of rights. Seld. Tab. Talk, "Fine." He says that the meaning of the great charter was to allow no man to be deprived of his ability to live according to his usual estate or "countenance." The great fines imposed during the times of the Stuarts, especially by the star chamber, were among the worst abuses of that period of tyranny. But very few, if any, instances can be found where men were made to forfeit their whole business receipts, and none certainly where they were made incapable of doing their ordinary business. The forfeiture of indefinite interests or sums only occurred in felonies when the penalty was death as well as forfeiture. It was in felonies, too, that disgrace and incapacity for any of the rights of citizens were imposed as penalties. These punishments have always been regarded as incompatible with our institutions, and there can be no doubt that the cruel and unusual punishments forbidden by the United States Constitution had special reference to the barbarities of the old law of felony. It is equally clear that any fine or penalty is excessive which seriously impairs the capacity of gaining a business livelihood. The penalties in this act, which are imperative and not discretionary, must necessarily break up business, and are not measured by any standard of proportion or amount. The only measure of restraint is the value of the business broken up, and this may reach tens or hundreds of thousands of dollars.

It is safe to say that throughout the United States any fine or forfeiture is unusual which has not some limitation of value, and any punishment is unusual which forfeits any civil rights. Dueling and conviction on an impeachment are the only two things in most states which involve civil incapacities of a public nature, and both of these are provided

Digitized by Google

for by the Constitution. Disability to transact business is almost or quite unheard of in this country.

The important question remains, how far the objections referred to destroy the statute. Although there is some difficulty in assuming that the Legislature would have passed the statute as it must be modified, yet it must be presumed they would have yielded to the constitutional objections if plainly pointed out; and in most other respects the law does not differ in principle from the existing legislation, and the new taxes and penalties not involving the peculiar disabilities named are valid, as well as the new methods of prosecution in the upper instead of the justices' courts. We therefore hold that, except as we have before pointed out, the law may be enforced. If difficulties arise upon points not considered by us, they will have to be dealt with as they arise; but there is no likelihood that there will be any such trouble in enforcing the essential parts of the law, and we cannot anticipate any serious question with the light we have received from the argument.

It follows that the *mandamus* against Justice Hang must be denied, as the application to him set out no offense in proper terms. The *mandamus* must issue to Justice Miner.

CHAMPLIN, MORSE, and LONG, JJ., concurred.

SHERWOOD, C. J. In these cases very important questions are presented. They interest every citizen in the State, and the welfare of every community. We are asked to compel by the mandate of this Court the judicial officers of the city of Detroit to take cognizance of cases of violation of the liquor law in this State enacted on the twenty-eighth day of June, 1887, for the purpose of regulating the manufacture and public sale of intoxicating liquor.

While I have no doubt that the object sought to be accomplished by the law in question is clearly within the province of the Legislature, under the police power of the State, yet

Digitized by Google

there are several provisions of this law which are unconstitutional and dangerous, and it would be unsafe to attempt to enforce them.

The manufacture or sale of intoxicating liquor carried on under the law, and according to its provisions, constitutes a legal business, and the liquor itself is property in the hands of its owner, and both the business and the property are entitled to the same protection from the law, so long as carried on lawfully, as any other business or property. Under the statute in question all persons paying the tax and giving the required bond approved may engage in the business. No class is excluded, but without such approved bond no person can engage in the business. The language of the statute, which requires the bond necessary to be given as the condition upon which the business may be engaged in, in regard to qualifications of persons taking out license, is:

"If the principal of said bond is known by said township board, or the board of trustees or common council of the village or city, to be a person whose character and habits would render him or her an unfit person to conduct the business of selling liquor, they, the said township board, or board of trustees, the council or common council of the village or city, as the case may be, shall refuse to indorse said bond with their approval."

And without such approval the county treasurer cannot receive the bond. And the act further provides that—

"A new bond shall be required by the county treasurer, with whom such bond was originally filed, in case of the death, insolvency, or removal of either of the sureties, and in any other contingency that he shall determine requires it,"—

And the party can sell no more liquors until such bond required by the treasurer is given, and approved by the municipal board, as was the first bond.

Thus it will be seen that this law places it in the discretion of the municipal board and that of the county treasurer to say whether any man may engage in this lawful business.

Digitized by Google

Under these clauses, by attributing to the applicant for the privilege of selling and doing business certain traits of character which he may never have possessed, but which are regarded by them as a disqualification, he may thus be precluded from engaging in the business altogether.

I agree with my Brother CAMPBELL, this cannot lawfully be done under our form of government. It is within the province of the Legislature to allow any person to engage in the business of making and selling intoxicating liquor. It is also within its power to limit the business to certain persons or classes, or to attach to its exercise conditions and such restrictions as it may deem proper for the best interests of the State and the people, not inconsistent with the spirit of the provisions of the Constitution.

But when conditions only are imposed, and all persons are permitted to engage in the business upon performing such conditions, the business remains a lawful one while it may be carried on, and such conditions must be reasonable. The Legislature alone has the power to impose them, and when they relate to qualifications of the person who is to carry it on, involving his character and habits, requiring those of fitness for the business, the law-making power should be specific in its requirements, and state particularly the elements entering into the necessary qualifications. This should be done that persons desiring to engage in the business may know whether they possess such qualifications or not, and, if they are denied to them, that they may have the opportunity of showing that they do possess them.

The right to carry on a lawful business cannot be made to depend upon the arbitrary will or caprice of any man, or local board, as is done under this law. Some standard of qualification must be fixed by the law itself, and then, whether the person who desires to engage in the business possesses the qualifications, measured by such standard, may be submitted to and determined by such local board as the

Digitized by Google

Legislature may designate. The provision relating to the action which may be taken by the county treasurer is a most remarkable one. He is expressly permitted to determine in what contingencies he will require the dealer in liquors to give a new bond or stop his business until it is done. The proper enforcement of the police regulations of the State requires the exercise of no such arbitrary and despotic power as is vested in the county treasurer in this provision of the act. It is simply intolerable under our Constitution and system of government.

I do not think the law is objectionable in its title. The title is broad enough and sufficiently specific to embrace all the provisions of the act, and they all relate to the same subject.

Neither do I think it competent, under our Constitution, for the Legislature to authorize a sheriff, marshal, constable, or police officer to close up a man's business at a time and place when and where he is allowed, under the law, to carry on such business upon complying with certain precedent conditions, when they have been performed, because such officer thinks he has good reason to believe that the dealer has been or is carrying on the business unlawfully, or has incurred a penalty or forfeiture in the manner he is carrying it on, as is permitted under section 7 of this act. A lawful business can only be interfered with, or a person's property taken from him or destroyed, after the owner has been served with proper process, and he has had his day in court, and been allowed the benefit and advantages of due process of law, and judgment of condemnation has passed against him. It is then, and not till then, the ministerial officer can act, and such action must always be confined to the execution of the judgment and mandate of the court. The protection the law gives to the business and property of the citizen is not left to the discretion of a sheriff, a marshal, or a policeman, but to the law of the land, with courts, and officers under their direc-

Digitized by Google

tion to execute it. Of this protection to private property no owner can be lawfully deprived for a single moment. It must be recollected that the violations under section 7, which authorize such interference, refer to times and occasions when and where the business could be lawfully conducted and performed by the owner.

This is not so under section 17 of the act, which reads as follows:

"All saloons, restaurants, bars, in taverns or elsewhere, and all other places, except drug-stores, where any of the liquors mentioned in this act are sold or kept for sale either at wholesale or retail, shall be closed on the first day of the week, commonly called 'Sunday,' on all election days, on all legal holidays, and until 7 o'clock of the following morning, and on each week-day night from and after the hour of 9 o'clock until 7 o'clock of the morning of the succeeding day. And it shall be the duty of sheriffs, marshals, constables, and police officers to close all saloons, houses, or places that shall be found open in violation of the provisions of this section, and to report forthwith all such violations to the prosecuting attorney, whose duty it shall be to immediately prosecute for such violations.

"The word 'closed' in this section shall be construed to apply to the back door, or other entrance, as well as to the front door; and in prosecutions under this section it shall not be necessary to prove that any liquor was sold: *Provided*, That in all cities and incorporated villages the common council, or board of trustees, or council, may, by ordinance, allow the saloons and other places where said liquors shall be sold to open at 6 o'clock in the forenoon, and to remain open not later than 11 o'clock in the afternoon, and no longer, of any week-day night, except on election days and holidays.

"Any person found in the act of violating any of the provisions of this section shall be deemed guilty of a breach of the peace, and punished accordingly; and the arrest therefor may be without process, and this punishment shall be taken to be in excess of all other manner of punishment in this act provided for a violation of the provisions of this section.

"All officers authorized to make arrests for a breach of the peace shall have like power to make arrests under the provisions of this section as in other cases of a breach of the peace."

Digitized by Google

This section prohibits the business being done at the times and in the places named, or the places being kept open, and a violation of the law in these respects is declared to be a breach of the peace, and the offense is punished accordingly. Under this section the most of the offenses are for violations in the night-time, when peaceable citizens are seeking repose; a time, too, when evil-disposed persons usually commit crime, breaches of the peace, and violations of good order, when the constabulary or police officers alone are expected to be in the vicinity, or able to make observation. The offense, too, is one that only needs to be seen to be detected, and if, when the violation is detected, the officer is not permitted to close the doors of places of this sort, where and when it is forbidden to open them, or to carry on the business, and the offense is a breach of the peace, under such circumstances it is very clear that the community and society would be deprived of the most beneficial results intended by the legislation. To close the doors of saloons opened during the hours specified in this section is not, as is contended, destroying a man's lawful business, but to prevent him from committing a breach of the peace by doing an unlawful act, one forbidden and made criminal by law. I think the Legislature may well authorize the officer to close the door of the saloon under such circumstances. I think this power is included in the power to prohibit, which has long since been adjudicated in this State to exist. I see nothing in this section unconstitutional or objectionable, nor anything more authorized than a reasonable exercise of the police power of the State will permit.

It is the arrest under this section, which is authorized to be made without process, of which much complaint is made. There is no doubt but that, under the law as established by this Court, it is entirely competent for an officer to make arrest without warrant of a person who is committing a breach of the peace in his presence, or is about to commit the

Digitized by Google

same. Such was the rule at common law, and in my judgment it is good common sense. It is claimed, however, that this rule should not apply to breaches of the peace created by statute.

While it has always been conceded by the ablest jurists, both in England and this country, that the common law furnished, at the time of its adoption, the best system of rules for the regulation of society, the community, and the state in a free government, still I do not understand that any of them have ever yet held that it contains the perfection of reason, nor that the offenses, misdemeanors, and crimes it recognized, defined, and classified, include all the offenses which persons are capable of committing against the peace and dignity of the people, or against good order and society. The convention of the people which framed our Constitution found the common law existing in the State as a part of the government, and, by an express provision, continued it as amended or changed by statutes then in force, when not repugnant to the Constitution, until altered or repealed by the Legislature. It is not, and never has been, in any sense supreme. The Legislature has full power over the whole system of laws it embodies, subject only to the Constitution of our State.

The Legislature is invested with the full power to adopt such police regulations for the State as it may in its wisdom see fit to make within the limitations of the Constitution, and it is its duty to adopt such regulations as will insure the peace, tranquillity, and good order of the people in every portion of the State, and for this purpose the Commonwealth may be regarded and is as one entire police district. The Legislature may, in its efforts to accomplish this object, whenever found necessary, create new crimes and offenses, and add them to the classifications of the common law, or classify them anew. Many kinds of business are now, and have been for years, carried on, both in England and this country,

Digitized by Google

which were entirely unknown and unheard of when the common law was adopted, and which are now absolutely necessary in conducting the business of the country in a prosperous manner, and to secure to the people the benefits of their enterprise and ability, resulting from the inventive genius of our citizens; and for the protection of such business and such enterprises, it has been found necessary to make laws and regulations providing penalties for infringements upon and injuries thereto, of various grades, including misdemeanors, breaches of the peace, and crimes amounting to felonies. Many kinds of business, even recognized and regulated by the common law, are now carried on in a manner and to an extent then never contemplated, and the dangers arising therefrom to the public have correspondingly increased, and to that extent that it has become absolutely necessary, in order to protect society against these excesses, to inflict penalties and forfeitures upon the offender commensurate with the offense, not only in excess of those recognized by the common law, but in some cases unknown to it. This is especially noticeable in the regulations of the business of vending intoxicating liquor.

It is the common knowledge of mankind that frequent quarrels, violence, and crime are induced by the excessive use of intoxicating liquor in places where it is kept and sold. And it is impossible to say that, when such places are kept open in the night-time until after peaceable citizens have retired to rest, it is not a breach of the peace in fact, and is no less such when made so by law. And when the offense is observed by those charged with the duty of maintaining the peace and enforcing the law, and who may serve process, I have no doubt of their power to make the arrest of the offender without process, and I cannot therefore hold the seventeenth section of the act objectionable in that regard. The power to arrest without warrant has always existed in criminal cases when the offender is seen committing the crime.

Digitized by Google

Without this power justice would frequently be evaded by reason of the escape of the criminal, or the failure to identify the person. I never have understood that actual violence was necessary to constitute a breach of the peace, but that any means used causing disquiet, disorder, and threatening danger and disaster to the community is equally sufficient to constitute the offense; and it may be questioned both upon reason and authority whether, in criminal cases arising to the grade of breach of the peace, due process of law ever required that process should issue before making the arrest of the peace-breaker.

If it be urged as a reason why it should not be allowed that in such cases there is great danger of being injured in reputation and property beyond possibility of redress, by reason, it may be, of the irresponsibility of the officer making the arrest, that danger certainly is much greater in the higher grades of crime than in the lower, and no one pretends that such arrests are not necessary and proper in the latter cases It is true, in a criminal case, due process of law means that no citizen of the republic can be deprived of his liberty or his property without trial before a properly constituted judicial tribunal, and a decision upon the rights of the matter, as determined under the laws establishing the right, according to the course, mode, and usages of the common law for the purpose.

This does not, however, necessarily include the manner the offender shall be brought before the court when the charge is made against him, if a speedy trial is accorded him. It is the substance of the right which is to be preserved, and which the Legislature cannot take away, and not the mere manner of reaching it, as I understand the law. The rule is that an arrest without process may always be justified in those cases where public security requires it; and this is clearly the result of our own decisions hereinafter referred to, and no other can be adopted with safety to the community.

Digitized by Google

I do not think the penalties imposed by the act, or the imprisonment for its violation provided, are in conflict with the provisions of the Constitution, either State or National. A reasonable discretion is vested in the court imposing them. The punishments under the act range from a fine of 6 cents and costs of prosecution to $500 and imprisonment from 10 days to 6 months. Either or both may be imposed; and for some violations of the act the offender may be made to forfeit the right to sell liquor, and the tax remaining unearned paid by him to the end of the year. There is nothing oppressive or unusual in the fine and imprisonment that may be imposed, and certainly a disability to do a business for a limited time, which it is lawful to entirely prohibit, is not excessive punishment, and I venture no authority, ancient or modern, can be found to assert a contrary doctrine.

I am aware that it has been decided that it is not competent, in the punishment of a common-law offense, to inflict fine and imprisonment without limitation, and that indefinite punishments are fraught with danger, and ought not to be admitted unless authorized by the written law. But I am not prepared to say with my Brother CAMPBELL that "a penalty is excessive which seriously impairs the capacity of gaining a business livelihood," nor am I prepared to admit that "any fine or forfeiture is unusual which has not some limitation of value," or that "any punishment is unusual which forfeits any civil rights."

The criminal law cannot be effectually administered at the present time under our Constitution, without to some extent, in most cases, having the effect to include one or more of these.

It must be remembered that criminal law of any grade is made to restrain and punish the law-breaker and not the law-abiding, and, as administered at the present day in this country, its talons are seldom found resting heavily upon the innocent.

Digitized by Google

It is said by an eminent jurist:[1]

"This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, 'Enjoy your own property in such a manner as not to injure that of another,' which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. * * * By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned."

The right to exercise this power is inherent in the people in every free government. It is not a grant derived from or under any written constitution. Without the Constitution the right in the people exists, and they have full power over the whole subject. The right of the Legislature to exercise the police power of the State is to the State the same as the law of self-defense to an individual. It exists for the same reason, can be exercised for the same purposes, to the same extent, and is derived from the same source. The Constitution places but few limitations or restraints upon the exercise of that power by the Legislature, and it would seriously impair its usefulness if it were otherwise. The power can only assert itself against the law-breaker by fines, penalties, forfeitures, and imprisonments, and in my judgment a court should pause long and consider well the action by the Legislature in establishing them, before it will say those fixed by its enactments are so far in excess of what is necessary to furnish the protection desired as to be obnoxious to the Constitution, which forbids "cruel and unusual punishments;" and, as I have already said, I find nothing in the act under

[1] Redfield, C. J., in *Thorpe v. Railroad Co.*, 27 Vt. 140, 149.

Digitized by Google

consideration in its seventh section approaching the limitations of the Constitution upon this subject.

The following authorities I find very largely supporting the views I have herein taken of these cases, as well as many others cited by counsel on both sides: *Way's Case*, 41 Mich. 304 (1 N. W. Rep. 1021); *Drennan v. People*, 10 Id. 169; *Quinn v. Heisel*, 40 Id. 576; *Doran v. Phillips*, 47 Id. 230 (10 N. W. Rep. 350); *Ross v. Leggett*, 61 Id. 445 (28 N. W. Rep. 695); *Davis v. Burgess*, 54 Id. 514 (20 N. W. Rep. 540); *People v. Haley*, 48 Id. 495 (12 N. W. Rep. 671); *People v. Burt*, 51 Id. 199 (16 N. W. Rep. 378); *Main v. McCarty*, 15 Ill. 441; *Bryan v. Bates*, Id. 87; Cooley, Torts, 176; *Ward v. Green*, 11 Conn. 456; *McCullough v. Com.*, 67 Penn. St. 32; *In re Powers*, 25 Vt. 261; *Mayo v. Wilson*, 1 N. H. 53; *Com. v. Hastings*, 9 Metc. 259; *Taylor v. Strong*, 3 Wend. 385; 2 Cooley, Bl. 243; 4 Id. 244; *Cahill v. People*, 106 Ill. 621; *Roberts v. State*, 14 Mo. 138; *White v.* Kent, 11 Ohio St. 550; *Spalding v. Preston*, 21 Vt. 9; Bac. Abr. Const. Cas.; *Williams v. State*, 44 Ala. 41; *Jones v. Root*, 6 Gray, 435; *State v. Miller*, 94 N. C. 904; *O'Kane v. State*, 69 Ind. 183; *Com. v. Costello*, 133 Mass. 192; *Com. v. Casey*, 134 Id. 194; *State v. McCann*, 59 Me. 383; *Mason v. Lothrop*, 7 Gray, 354; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Shultz v. Cambridge*, 38 Ohio St. 659; Cooley, Const. Lim. 211–216; 2 Story, Const. § 1904; *Pervear v. Com.*, 5 Wall. 475; *Barker v. People*, 3 Cow. 686.

In applying the constitutional provisions to the law in question, for the purpose of ascertaining whether it is in conformity therewith, it becomes our duty to give them a reasonable construction with a view to give the law effect; and in so doing we must not lose sight of the fact that if some of its provisions are inconsistent, or even in violation of what we may deem sound political principles, but which do not infringe the Constitution, they cannot be declared void upon

Digitized by Google

that ground. *People v. Mahaney*, 13 Mich. 481; *People v. Gallagher*, 4 Id. 244; *People v. Common Council*, 29 Id. 108.

For the reasons above stated I concur in the result reached by my Brother CAMPBELL, but prefer to leave the other questions discussed by him for consideration when a proper case shall arise making such discussion necessary.

68 576
79 284
68 576
105 148
68 576
154 2 41

THE BOARD OF METROPOLITAN POLICE OF THE CITY OF DETROIT v. THE BOARD OF AUDITORS OF WAYNE COUNTY.

Constitutional law—Liquor law of 1887—Extension of power to board of metropolitan police of Detroit—Patrolling suburbs to city.

1. The attempted extension of powers to the board of metropolitan police of the city of Detroit by section 33 of Act No. 313, Laws of 1887, to *police* certain townships in Wayne county for the purpose of enforcing the provisions of said act therein, is illegal.

2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—Act No. 78, Laws of 1865, establishing a police government for the city of Detroit, was considered in *People v. Mahaney*, 13 Mich. 481, and held sufficient to replace a city marshal by the officers substituted.

b—The reference in the title to a police government cannot mean a government in the ordinary sense in which municipal and local governments exist, and the word *system* would have been more appropriate, and not misleading.

c—Under our system we can have no governments, general or special, that do not immediately represent a *popular* constituency, and no properly called governmental power can be lodged anywhere else.

d—The Legislature has power to confer upon townships, cities, villages, and boards of supervisors *local* legislative and administrative powers such as are suited to their condition; but there

Digitized by Google

is no other power mentioned in the Constitution for conferring similar public governing authority elsewhere, and these bodies are all created by popular elections.

e—It was held in *Attorney General v. Detroit Common Council*, 58 Mich. 218, that the people could not be subjected to any delegated powers of government not exercised by their own representatives.

f—The police board and its appointees or deputies can only be regarded as lawfully exercising ministerial and administrative functions in obedience to the statutes of the State and the ordinances of Detroit, and no more; and under the title of the creative act they are confined, in their legal action, to such *territorial* limits as belong to the city of Detroit, and such as might be allowed to be covered by city appointees if the city itself appointed its own police. *Allor v. Wayne Co. Auditors*, 43 Mich. 76.

Application for *mandamus* to compel respondents to pay the expense of patrolling certain territory in townships outside of Detroit, under the liquor law of 1887. Submitted January 11, 1888. Denied March 2, 1888. The facts are stated in the opinion.

William A. Moore (*Edwin F. Conely*, of counsel), for relators.

George F. Robison, prosecuting attorney, for respondents.

CAMPBELL, J. This is an application to compel the respondents to pay out of the treasury of Wayne county the expense claimed by relators to have been incurred in patrolling certain territory in the townships outside of Detroit under section 33 of Act No. 313, Laws of 1887, popularly known as the "Liquor Law." A defense was put in by respondents to the effect that no duty such as that statute purports to lay upon them can be legally enforced. The argument was chiefly based on grounds independent of those affecting the constitutional objections applicable to other questions arising on the law, and the case is of such a nature that we prefer to base our action on these separate grounds

Digitized by Google

without reference to the general scope and character of the statute.

The section before us for consideration reads as follows:

"That for the better enforcement of the provisions of this act in that portion of the county of Wayne which forms the suburbs to the city of Detroit, the jurisdiction of the board of metropolitan police of said city is hereby extended over the townships of Springwells, Greenfield, Hamtramck, and Grosse Point in said county. And it shall be the duty of the board of metropolitan police to police said townships sufficiently strong to enable them to enforce the provisions of this act within the limits thereof, and for that purpose said board of metropolitan police are authorized to increase the police force under their control, to mount said increase, or any portion thereof, and are vested with the same authority as is now conferred upon them within the corporate limits of the said city of Detroit, and may use all or any portion of the force under their control.

"The police force so employed in said townships shall have and are hereby vested with the same powers to enforce the provisions of this act, and to preserve the peace, as is by general law conferred upon the constables therein. The expenses of maintaining such extra force of police in said township shall be paid monthly by the county of Wayne out of the moneys paid into the treasury of said county under the provisions of this act, on duly certified vouchers therefor, prepared and submitted by said board of metropolitan police to the board of county auditors of said county, who are hereby directed to audit and pay the same in the same manner as other claims for services against the county of Wayne are audited and paid."

The ninth section of the liquor law requires one-half of the moneys paid for liquor taxes to be paid into the general fund of the county treasury.

The metropolitan police board was originally created under an act of 1865 entitled—

"An act to establish a police government for the city of Detroit." Laws of 1865, p. 99.

Each commissioner must be a resident freeholder of Detroit, appointed by the Governor and Senate. All of the general

Digitized by Google

powers and duties of the board and its appointees are local, and some of them are new and peculiar. There have been more or less changes and amendments, but none that are important in the present inquiry.

In *People v. Mahaney*, 13 Mich. 481, the validity of this act, so far as it authorized the creation of the force, was considered, and it was held sufficient to replace a city marshal by the officers substituted. Several other questions were discussed, but not decided, but reserved for future consideration as not necessarily in the case. No case has since been before this Court having much bearing on the validity of the statute. But the present case requires some consideration of the powers lawfully belonging to such a board.

Although the title of the act refers to a police government, this cannot mean a government in the ordinary sense in which municipal and local governments exist. The word "system" would have been more appropriate, and not misleading. Under our system we can have no governments, general or special, that do not immediately represent a popular constituency, and no properly called governmental power can be lodged anywhere else. Our State Constitution has provided for local municipalities, embracing counties, cities, villages, townships, and school districts, which it has been held mean such bodies of those names as were of a nature familiar and understood. The Legislature has power to confer upon townships, cities, villages, and boards of supervisors local legislative and administrative powers such as are suited to their condition. But there is no other power mentioned in the Constitution for conferring similar public governing authority elsewhere, and these bodies are all created by popular elections. It was held in *Attorney Gen. v. Detroit Common Council*, 58 Mich. 213 (24 N. W. Rep. 887), that the people could not be subjected to any delegated powers of government not exercised by their own representatives.

Digitized by Google

It is evident, on all constitutional principles, that the police board and its appointees or deputies can only be regarded as lawfully exercising ministerial and administrative functions in obedience to the statutes of the State and the ordinances of Detroit, and no more. And under the title of the act creating them they are confined, in their legal action, to such territorial limits as belong to the city of Detroit, and such as might be allowed to be covered by city appointees if the city itself appointed its own police. See *Allor v. Wayne Co. Auditors*, 43 Mich. 76 (4 N. W. Rep. 492).

It is not competent for the Legislature to enlarge their powers, in the way attempted here, by an act which is in no way amendatory to the act of 1865, but which takes the city board and as such gives it jurisdiction over a territory foreign to the city. The adjacent townships have no more legal dependence on a city than any others, and are just as much entitled to an independent existence. Not only is the police board a city board, but it is composed entirely of city resident freeholders. No one outside of the city can be represented on it even by the Governor's appointment.

This local board is not only given by this act the power to send the city police into the townships, but also is given what the statute calls "jurisdiction" there. And this is not a mere form, for it rests entirely in their discretion how many and what men shall be sent, and where they shall be detailed, in each township. All of the arrangements are left exclusively to the board, who can incur such expenses as they choose, and make the county treasury pay for it. The city of Detroit bears all the ordinary expenses of the board, and by this statute the county at large must bear the rest. It is nominally drawn from the liquor taxes in the county treasury, but those go into the general fund of each county, for general county purposes, and to that extent lessen the necessity of ordinary taxation, so that it amounts to the same

Digitized by Google

thing as direct taxation. The result is that the local board of Detroit draws from the funds of the county to carry on its own work in part of the townships entirely beyond its own jurisdiction, and at the expense as well of the cities and townships where none of this money is spent as of the townships patrolled.

We think that no such extension of powers can be granted, and that the attempt to make the grant is illegal.

It was claimed on the argument that this was only an enlargement of the police district. But supposing—what we are not prepared to decide—that the Legislature may create districts at its pleasure, it has not pursued the constitutional requisites for doing it and has not attempted to do it. There is no attempt to make this board cease to be a city board. All of its localized duties and facilities remain, and the taxation that provides for most of its outlays is city taxation. Its duties in connection with the city courts and the city government remain entirely unchanged. The four towns are in no way represented in its action any more than the rest of the county.

We are not, therefore, required to consider whether the Legislature can create police districts not conforming to any municipal subdivision of the State, or to pass upon any of the other questions of power which present themselves somewhat seriously concerning this exceptional variation in our system of local government. There are recognized limits to legislative power in this regard which it may be desirable to have settled, but which cannot be discussed here. We cannot pass upon them until they are brought here in some course of litigation, and therefore nothing can be assumed from our failure heretofore or now to rule upon them. The legislation upon Detroit matters has been so often changed and so peculiar as to require care in judging it.

The *mandamus* is denied.

CHAMPLIN, MORSE, and LONG, JJ., concurred.

Digitized by Google

SHERWOOD, C. J. (*dissenting*). The petitioners in this case ask for a *mandamus* requiring the respondents to hear and pass upon, and, if found correct, audit and pay, a certain claim of the petitioners for police service, rendered and presented by them to be audited and paid as provided for in Act No. 313, sections 9 and 33, pp. 453, 459, Laws of 1887.

The relators in their petition set forth the following as grounds for the writ:

"1. That they are the board of metropolitan police of the city of Detroit, organized and exercising their functions and authority under and by virtue of an act of the Legislature of the State of Michigan entitled 'An act to establish a police government for the city of Detroit,' approved February 28, 1865, and various other acts and parts of acts amendatory thereof and supplementary thereto.

"2. That for the better enforcement of the provisions of an act of the Legislature of the State entitled 'An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented liquors, and vinous liquors, in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act,' approved June 28, 1887, in that portion of the county of Wayne which forms the suburbs of the city of Detroit, and in pursuance of the provisions of the said act, the petitioners, on September 29, 1887, duly detailed two patrolmen of the police force under their charge and control for the special duty of enforcing the provisions of the act last mentioned in the townships of Hamtramck and Grosse Point, in said county of Wayne, and on and through the day last mentioned, for the purpose aforesaid, kept and maintained in the townships above named a police force consisting of two patrolmen so detailed as aforesaid, who, on account of the extent of territory to be observed by them, were by the petitioners mounted on horseback.

"3. That the actual expense of maintaining such police force in said townships, for the purpose and during the time above mentioned, was the sum of six dollars, which was paid by the petitioners, for the use of two saddle horses by said patrolmen in the performance of the duty for which they had been detailed, but no other expense was incurred in that behalf during the month of September.

Digitized by Google

"4. That on September 30, 1887, at the meeting of the board of metropolitan police, the account of said expenditure was duly considered and approved by the board, and by them ordered to be presented to the board of auditors of the county of Wayne, for allowance, auditing, and payment on voucher as explained in the next paragraph.

"5. That on October 1, 1887, by and in accordance with the direction of the board of metropolitan police, the secretary thereof transmitted and submitted to the board of auditors aforesaid a duly certified voucher showing the expense of maintaining such police force in the townships aforesaid, as above explained, but the said board of auditors wholly refused, and from thence hitherto have wholly refused and still do refuse, to hear, consider, pass upon, or in any wise entertain the same, alleging in substance and effect as a reason for their conduct that they were not obliged so to do by the law of the land."

The answer of the respondents is as follows:

"1. They say that the facts set forth in the petition in the cause are substantially true.

"2. That these respondents were informed by the petitioners that the probable cost of the maintenance of such policemen as they propose to locate in the four townships mentioned in said act will be annually not less than $25,000; that the respondents were advised by the prosecuting attorney of said county that there was a grave doubt as to the validity and constitutionality of that provision of said act requiring the county to pay such expense.

"3. That, acting under his advice, respondents refused to pay said claim for the express purpose of obtaining from this Court an early decision of the validity of the provision under which the claim was made."

The case was heard upon the foregoing petition and answer. It will be noticed that the unconstitutionality of the act referred to is the only defense urged against the prayer of the petition by the respondents.

It is claimed the law infringes that clause of the Constitution which requires that "no law shall embrace more than one object, which shall be expressed in its title."

Also that clause which says:

"No law shall be revised, altered, or amended, by reference

Digitized by Google

to its title only, but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length."

It is also claimed that the act requires unjust and unequal taxation; that it is unjust to maintain a special police force in a township at the expense of the whole county.

I do not think the section of the law under consideration is obnoxious to either of the provisions of the Constitution referred to. In the exercise of the police power of the State it is proper for the Legislature to divide the State into as many police districts as it may see fit, and to police them in such manner as it shall deem best, so long as the action taken is within the limitation of the Constitution; or it may adopt the existing political divisions of the State as such districts. The power of the Legislature in this respect is always sufficient to meet the necessities of the case, in the most reasonable manner, and the one least oppressive and offensive to the people, and having also some regard to economy in any system it may adopt.

The city of Detroit is within the county of Wayne, and contains three-quarters of all the population of the county. There are within the county eighteen outlying townships. The four named in the section of the act referred to are suburban to the city, and for the purposes of preserving the peace and good order may require policing as much as do the adjoining portions of the city. Although, as stated upon the argument, neither of these townships contains over 60 saloons, yet I think this number should be regarded as quite sufficient to engage the attention of the Legislature to the necessity of devising some means of preserving the peace in those townships; and I am not prepared to say those adopted in the law under consideration are not suitable for the purpose. It is certainly not for this Court to say whether it is the best system that could be devised, nor can there be any constitutional objection to making the entire county of Wayne a

Digitized by Google

police district, and to authorize the appointment of police officers, and direct their patrols, in the manner provided in this section.

It will not do to say that one of these local communities may be left at liberty to enforce proper police regulations, or those provided for the protection of peaceable quiet citizens in their homes and in their property therein from breaches of the peace and the vandalism of the law-breaker and the lawless, or not, as a majority of the voters shall determine, or if the officers elected shall fail to furnish the necessary protection. The State's duty to its citizens is imperative upon this subject, and that is to preserve the peace, health, life, morality, and property of its people, wherever they may be located within its borders, if it has to resort to all the power in the State for the purpose.

We are not informed of the necessity for furnishing additional police force to insure a proper observance of the law in these outlying townships, nor what is the disposition of the police officers of those townships in regard to the discharge of their duties in the premises. That is a matter with which this Court has no concern. It is a subject, however, which is peculiarly within the province of the Legislature to investigate, and upon which to act if any action is required. It would appear they have taken such action, from the thirty-third section of the act, which section reads as follows:

"That for the better enforcement of the provisions of this act in that portion of the county of Wayne which forms the suburbs to the city of Detroit, the jurisdiction of the board of metropolitan police of said city is hereby extended over the townships of Springwells, Greenfield, Hamtramck, and Grosse Point, in said county. And it shall be the duty of said board of metropolitan police to police said townships sufficiently strong to enable them to enforce the provisions of this act within the limits thereof, and for that purpose said board of metropolitan police are authorized to increase the police force under their control, to mount said increase, or

Digitized by Google

any portion thereof, and are vested with the same authority as is now conferred upon them within the corporate limits of the said city of Detroit, and may use all or any portion of the force under their control. The police force so employed in said townships shall have and are hereby vested with the same powers to enforce the provisions of this act, and to preserve the peace, as is by general law conferred upon the constables therein.

"The expenses of maintaining such extra force of police in said townships shall be paid monthly by the county of Wayne out of the moneys paid into the treasury of said county under the provisions of this act, on duly certified vouchers therefor, prepared and submitted by said board of metropolitan police to the board of county auditors of said county, who are hereby directed to audit and pay the same in the same manner as other claims for services against the county of Wayne are audited and paid."

The facts upon which that action is based we cannot consider. The only question before us is, had the Legislature power, under the Constitution, to take such action?

The law does no more than authorize the metropolitan police of Detroit to appoint policemen to patrol the townships for the purpose of enforcing obedience to the law. No other or new power is conferred upon the metropolitan police. The policemen appointed for this particular service do not derive their authority to act from the metropolitan police. That is conferred upon them by the statute. Neither does their authority interfere with the police officers of the township. The policemen appointed are only an additional force to those of the township, and as the law itself says,—

"For the better enforcement of the provisions of this act in that portion of the county of Wayne which forms the suburbs to the city of Detroit."

And it will be noticed that no more men are to be appointed than are necessary for the purpose. If the law is not violated, there will be no need of the services of the added policemen. If the township force is sufficient to and does secure obedience to the law, then there will be no need

Digitized by Google

to use the added police force. The county is a police district, each township is another, and the city is another.

If in case the officers and people of either of the townships named shall fail for any reason to enforce the law, and thereby expose the peaceable citizens therein and their property to the lawless and violent, and it is necessary to bring outside force to bear upon them to preserve the peace, it is difficult to see how it can be better done than to take such force from the adjoining city. This is precisely what the Legislature has in this section of the act directed to be done, and I have not yet discovered any provision in our Constitution violated by such legislative action.

There is nothing appearing in this record showing that the expenses of the additional force may not and ought not to be borne by the county, and, if so charged, that the levy of the same would produce unequal or unjust taxation. It is in this manner the law requires that burden to be borne, and I can see no constitutional objection to it. The act itself provides that half the fund arising from the liquor taxes shall be placed to the credit of the county. It is placed in the general fund, and it would be a strange ruling, indeed, that would preclude these outlying townships from sharing in that fund when they are seeking to apply it to the very purposes for which it was created.

The section we are considering limits the force that can be used to those "sufficient to enable them to enforce the provisions of the act within the limits" of the township, so that the power of these policemen to act, and the extent of that power, the territory in which they may act, and the particular law to be enforced by such action, are all specified in the law under consideration, and are not left to the exercise of power vested in the metropolitan police, nor to its discretion. In performing the duties required by the Legislature, no local constituted authorities in the towns or the divisions thereof, or their right to self-government, is inter-

Digitized by Google

fered with, and it is only when such local action is not taken, or, if taken, it is found insufficient, that the newly-appointed policemen can act at all.

The board of metropolitan police is a State institution. Its members are appointed by the Governor, by and with the advice and consent of the Senate, under the requirement of the act of the Legislature. It is not in any sense a governing body. It is simply invested with the power to put into execution the means provided by the Legislature to preserve the peace. It is the privilege and duty of a township under the Constitution to manage its own local affairs, as it is the county, its affairs, and to keep the peace; and when either fails to keep the peace, the obligation of the State begins at just that point to see to it that such means are used as will accomplish that object. This deprives the township of no rights, but simply aids it in protecting those for which it was created, and with which it was invested. As I have said, the duty, under our form of government, of preserving the peace, primarily rests upon the Legislature, and it does not divest itself of the discharge of that duty by intrusting its execution to the local authorities of a township elected for the management of the township's local affairs. Were this the fact, the Legislature would possess the power at any time of divesting itself of the ability to protect the State against disorder and violence.

I fully agree with my Brother CAMPBELL that, under our Constitution, there cannot be any such thing as a municipal government which is not managed by popular representatives and agencies deriving their authority from the inhabitants, and no business which is in its nature municipal can be controlled by State or any other outside authorities. But maintaining the peace is not in itself solely municipal. People outside the lines of a municipal corporation are interested in the prevention of crime and the maintenance of peace and good order therein, and the business of suppressing such

Digitized by Google

offenses against the State is not in its nature of a local character, and has never in this country been regarded as such.

I further agree with my Brother CAMPBELL that, while the local police officers necessary to constitute the requirement of the township cannot be superseded in the discharge of their ministerial duties, as is said in *Allor v. Wayne Co. Auditors*, 43 Mich. 76, the State may provide for other policemen to be auxiliary to them in keeping the peace; and that, under the metropolitan police law, the police force added to the police of the wards is no more than an "additional force of constables and watchmen" appointed by the State for certain limited purposes.

This has been held constitutional by this Court. See *Allor v. Wayne Co. Auditors, supra.*

The act in question, as I have shown, does nothing more for these townships than is done by the metropolitan police act for the several wards of Detroit, and I think both are clearly constitutional. *People v. Mahaney*, 13 Mich. 481; *Allor v. Wayne Co. Auditors*, 43 Id. 76 (4 N. W. Rep. 492); *People v. Draper*, 15 N. Y. 532; *Metropolitan Board v. Barrie*, 34 Id. 657; *People v. Shepard*, 36 Id. 285.

In construing constitutional provisions of our own State it must always be borne in mind that the Constitution is not a grant of power, but a limitation thereof; and that, in construing this section of the statute, we cannot ignore the fact that the police power is a sovereign State power which may be delegated and resumed at pleasure, as circumstances may require.

I think the *mandamus* should be granted.

Digitized by Google

68 590
78 479
68 590
81 490
68 590
91 340
92 266
68 590
103 140
68 590
137 121
68 590
140 467
68 590
142 396
68 590
155 93

CHARLES R. BRAND AND GILBERT MCCULLOUGH v. THEODORE H. HINCHMAN ET AL.

Malicious prosecution of attachment suit—Necessity of actual seizure of property to sustain action—Constructive service of writ—Settlement of debt—Probable cause—Evidence—Malice—Damages.

1. An action for malicious prosecution will lie without any arrest or seizure of property.
2. The settlement of the debt by a defendant in an attachment suit, and the payment of the costs of the proceedings, is *not* a bar to an action for malicious prosecution if the attachment was malicious and without probable cause.
3. The action of an officer in going to the store of a defendant in an attachment suit, and showing him the writ, and remaining in the store for the purpose of preventing any goods being taken therefrom, must be regarded as a constructive service of the writ or taking possession of the goods.
4. The want of probable cause for suing out a writ of attachment in itself raises a presumption of malice under the law.
5. If the plaintiff *honestly* believes that there is probable cause for suing out a writ of attachment, the mere fact of its *non-existence* will not render him liable for malicious prosecution; and it is for the jury to determine if he entertained such belief, which fact they must determine by ascertaining what careful and prudent business men would have done under like circumstances.
6. In a suit for malicious prosecution in suing out a writ of attachment, evidence of the publication in a newspaper of a notice of such attachment, and of the circulation of the paper, is admissible as tending to show the publicity given to the act complained of; and the plaintiff may also show that his business reputation was good before the issuance of the writ.

Error to Wayne. (Jennison, J.) Argued January 13, 1888. Decided March 2, 1888.

Case for malicious prosecution of an attachment suit.

Digitized by Google

Defendants bring error. Affirmed. The facts are stated in the opinion.

Griffin, Warner, Hunt & Berry, for appellants.

Henry M. Duffield, for plaintiffs.

MORSE, J. Plaintiffs sued defendants for a malicious prosecution of an attachment suit, and recovered verdict and judgment for $625, in the circuit court for the county of Wayne.

On the fourth day of August, 1885, John M. Hinchman, one of the defendants, and in their behalf, made affidavit and obtained a writ of attachment in the superior court for the city of Detroit against the plaintiffs. The affidavit alleged that the plaintiffs were indebted to the Hinchmans in the sum of $473.11 over and above all legal set-offs, and that the same was due upon express contract; also, that the said plaintiffs, as the deponent in the affidavit had good reason to believe, were about to assign their property or dispose of it with intent to defraud their creditors, and were about to conceal their property, or some part thereof, with intent to defraud their creditors.

The writ was left at the sheriff's office, and put in the hands of a deputy for service. This deputy, with another officer, proceeded to the store of the plaintiffs between the hours of two and three o'clock in the afternoon of the day the writ issued. He saw one of the plaintiffs, Mr. Brand, sitting at the desk, and informed him that he had a writ of attachment in favor of Hinchman & Sons, the defendants in this action, and against plaintiffs. He exhibited the writ to Brand. Brand said the matter was settled, and asked time to see Hinchman & Sons, or their attorneys, which was granted. The officer swears that he told Brand he would stay in the store until he returned, and would make no levy. He testifies further that he made no levy, and did not take

Digitized by Google

possession of the store or any of the goods therein. He claims that he remained in the store not more than half an hour, when Mr. Berry, a clerk in Hinchman & Sons' attorneys' office, came and told him to go out, as the matter was arranged. He claims he did not serve the writ.

The writ was returned by the sheriff August 13, 1885, with the following indorsement by the attorneys for Hinchman & Sons:

"To the clerk. Please enter an order discontinuing this case."

The return was as follows:

"By direction of the plaintiffs' attorneys, I hereby return the within writ without service, the case having been discontinued. GEORGE H. STELLWAGEN.
"By H. H. Trainor, Deputy-Sheriff."

On the tenth day of August, 1885, the plaintiffs in this suit paid the debt to Hinchman & Sons, and seven dollars as costs of suit. Mr. Brand testifies that the officer showed him the writ, and said he had an attachment against his goods. Brand left the officers in the store when he went to see Hinchman & Sons. They were gone when he returned. Mr. McCullough swears that he came to the store soon after Mr. Brand went out. The officers were in the store when he arrived, and remained there about half an hour after he came. The officers said nothing to him about the attachment, but he suspected it.

It appears clearly enough from all the evidence that no formal levy or service of the attachment was made, and no manual possession or disturbance made of the goods; yet the officers virtually had a possession of the store while they stayed there, and one of them testified that, had any one attempted to remove any of the goods out of the store, he should have interfered and prevented it.

Some evidence was introduced as tending to show damages, as follows:

Digitized by Google

Plaintiffs had been, before this, doing business with J. C. Wemple & Co., of New York, purchasing goods of them on credit. August 12, 1885, they gave an order to this firm, through an agent, for a bill of goods, amounting to $136, informing him of the attachment proceedings. About a week thereafter they received a letter from Wemple & Co., stating that if plaintiffs would pay cash for the goods they would send them, and give a discount of 3 or 4 per cent. The plaintiffs then countermanded the order.

A truckman brought a barrel of glue to the store. He wanted the money for it. No one but a clerk of plaintiffs was at the store. He did not know whether the bill for the glue was correct or not, and would not pay it, and the truckman took the glue away.

It was also shown, under objection, that the following paragraph was published in the Detroit Free Press of August 5, 1885:

"In the superior court, yesterday, T. H. Hinchman & Sons swore out an attachment against Charles R. Brand and Gilbert McCullough."

Mr. Brand testified that one Anderson, an architect, told him that he had wished him to figure on a job of Edward Kanter, but thought there was no use, as the architect had heard there was an attachment upon their property, and plaintiffs closed up. When he found out they were all right it was too late, as the bids had been received, and the job let at $1,100. Brand was permitted to testify, against objection, that the profits upon the job at $1,100 would ordinarily be from 10 to 20 per cent. "It might be more; it might be less."

The plaintiffs also introduced evidence tending to show that they were solvent and able to pay their debts at the time of the attachment, and had not assigned, disposed of, or concealed any of their property with intent to defraud their creditors, and had no intention of so doing.

Digitized by Google

Defendants' counsel, when plaintiffs rested, moved to strike out the testimony in relation to the Wemple transaction and the barrel of glue; also the testimony of A. H. Dey, president of the American Exchange National Bank, who had testified that the plaintiffs were depositors and borrowers at his bank for a number of years, and that he knew nothing against their reputation for honesty and integrity in the community. The defendants' motion was denied as to all this testimony, and exception taken.

The defendants made no showing as to any facts upon which they based their affidavit for the attachment writ except that the plaintiffs refused to give Mr. Berry, a clerk in the office of Griffin & Warner, who had the bill of Hinchman & Sons for collection, any statement of their assets and liabilities, and did not meet some of their promises to pay the debt.

John M. Hinchman, who made the affidavit, testified that he, at the time of making it, fully believed that he had good reason to believe as therein stated. He also testified that Brand said, in excuse for non-payment of the bill, that McCullough was frequenting saloons in business hours, and did not attend to business, leaving the whole burden upon him, and Hinchman also thought that he had seen McCullough under the influence of liquor, which influenced his judgment about the matter. On cross-examination he stated that the refusal of Brand & McCullough to give their assets and liabilities to Berry cut no figure, and had no bearing upon his intention or mind when he made the affidavit, and that he had heard nothing of any disposition of property by plaintiffs at that time, and could not remember that he had heard of any concealment of their property with intent to defraud creditors. He was afraid of a chattel mortgage that might be made upon the stock to shut off creditors, but did not remember of hearing any one say that plaintiffs were about to make such a mortgage.

Digitized by Google

The first objection made by defendants' counsel against this judgment is that no action for malicious prosecution will lie unless there has been an arrest of the person or a seizure of the property.

The declaration in the case in the first count substantially charged a malicious suing out of the writ without probable or reasonable cause, a seizure of the goods in the plaintiffs' store under said writ, and a possession of the same taken and held for a half day, disturbing and injuring the business of plaintiffs; and that the defendants withdrew the sheriff from the store upon the promise of the plaintiffs, under compulsion of said levy and attachment, to pay the claim of Hinchman & Sons on a certain day, which payment was duly made by plaintiffs; that the attachment was known to many of the customers of plaintiffs in Detroit and elsewhere, and to the public generally, and to merchants in the cities of Detroit, Boston, New York, Philadelphia, and elsewhere, with whom the plaintiffs had dealings; and that plaintiffs were thereby greatly injured in their credit and reputation, and put to great expense in obtaining a dissolution of said writ of attachment.

The second count reads as follows:

"And whereas, also, the said defendants, further contriving and maliciously and wickedly intending as aforesaid, heretofore, to wit, at the time and place and in the manner aforesaid, did falsely, and maliciously, and without reasonable or probable cause, sue out and prosecute, and cause to be sued out and prosecuted, the writ of attachment as aforesaid, commanding the sheriff, etc., as aforesaid, and the said sheriff attached certain property of said plaintiffs in the county of Wayne as aforesaid, pursuing the directions of said defendants and their agents, belonging to said plaintiffs, which said property was of great value, to wit, $10,000; the said defendants wickedly and maliciously intending by said large, excessive, and unnecessary seizure and attachment of said property as aforesaid to injure and annoy said plaintiffs.

"And the said plaintiffs say that, by reason of the premises,

Digitized by Google

they were greatly injured in their credit and reputation, and put to great inconvenience and expense, at, to wit, Detroit aforesaid, and elsewhere, to the damage of the plaintiffs $10,000."

While in this case there was no service of the writ, there was at least a technical taking and possession of the property. The officer went in the store to make the levy, and did not go out of it until ordered to by the agent of Hinchman & Sons. He testifies that he should have prevented any one from removing any goods from the building, and he certainly had possession enough to have done so.

But, whether he had such possession or not, I am fully satisfied, from a consultation of the authorities, that the action is maintainable without any arrest or seizure of property.

There are but few, if any, wrongs for which the law does not provide a remedy, and if a man is hurt or damaged in his property, business, credit, or reputation, by the malicious commencement or prosecution of a civil suit, without probable cause, the better doctrine is that he can maintain an action on the case for such hurt or damage.

Some of the authorities presented by the counsel for defendants upon the argument support his position, notably the following: *McNamee v. Minke*, 49 Md. 133; *Mayer v. Walter*, 64 Penn. St. 283; *Wetmore v. Mellinger*, 64 Iowa, 741 (18 N. W. Rep. 870); *Potts v. Imlay*, 4 N. J. Law, 330; *Bitz v. Meyer*, 40 Id. 252.

The majority of text writers also sustain the proposition of defendants' counsel, as do also the English authorities. The principle is grounded, in most of these cases, and by the text writers, upon the idea that in a malicious civil suit, where no property is seized, and the person is not molested, the recovery of his costs is a sufficient recompense to the injured party. Where a civil action is wrongfully brought, the costs which the party gets are a compensation for the

Digitized by Google

wrong; but in a criminal proceeding there are no costs. Townsh. Sland. & Lib. § 419; 2 Add. Torts, § 863.

While it may perhaps be said that the weight of authority denies the action in such cases, the weight of reason certainly approves it. And latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of the suit.

The matter of costs I do not consider a sufficient reason for denying remedy, as the costs, under our practice, awarded the prevailing party, are never sufficient to re-imburse him for the actual cash expenses of the litigation, to say nothing of the loss of time and the inconvenience and trouble suffered. Even some of the cases cited by defendants' counsel hold, in language at least, that, without an arrest of the party or a seizure of his goods, if any special injury is sustained by him, an action might lie to recover his damages for such injury. See *Welmore v. Mellinger*, 64 Iowa, 741, 744 (18 N. W. Rep. 870); *Bitz v. Meyer*, 40 N. J. Law, 252.

A large number of cases hold that it is not necessary that there should be an arrest or a seizure of property, but that the malicious prosecution of a civil suit, and epecially the swearing out of a false attachment without probable cause, is actionable. *Tomlinson v. Warner*, 9 Ohio, 104; *Fortman v. Rottier*, 8 Ohio St. 548; *Marbourg v. Smith*, 11 Kan. 554; *Whipple v. Fuller*, 11 Conn. 581; *Closson v. Staples*, 42 Vt. 209; *Pangburn v. Bull*, 1 Wend. 345; *McCardle v. McGinley*, 86 Ind. 538; *Lockenour v. Sides*, 57 Id. 360; *Burnap v. Albert*, Taney, 244; *Cox v. Taylor's Adm'r*, 10 B. Mon. 17; *Eastin v. Bank*, 66 Cal. 123 (4 Pac. Rep. 1106); *Burton v. Railway Co.*, 33 Minn. 189 (22 N. W. Rep. 300); *Parmer v. Keith*, 16 Neb. 91 (20 N. W. Rep. 103); *Woods v. Finnell*, 13 Bush, 629.

The reason for the rule laid down by these last-mentioned authorities seems to me to be satisfactory and in accordance with right and justice. The common law declares that for

Digitized by Google

every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed. But this is my individual opinion, the other members of the Court not deeming it necessary in this case to express any opinion upon this matter.

It is also urged against the right of plaintiffs to maintain their action that the pleadings and proofs both show that the attachment suit was not determined in favor of the defendants in that cause, the plaintiffs in this suit, and that an adjustment, compromise, settlement, or payment of a claim, with full knowledge of the facts, and of the methods of procedure which have been adopted for the purpose of enforcing it or collecting it, is a bar to an action of malicious prosecution.

This objection is not tenable. When the action complained of is the beginning or prosecution of a criminal suit or proceeding it is properly held, by all the authorities, that the determination of such suit or proceeding must be such as does not admit a reasonable cause for the prosecution. There must be an acquittal, or such proceedings as determine the case in the favor of the accused person without any settlement by him of the criminal charges, or any connivance on his part to secure his discharge. This is also the general rule where a groundless and malicious civil suit constitutes the cause of action. Were the rule otherwise, the defendant in the action complained of might recover in an action for malicious prosecution, and yet be convicted, or have a judgment rendered against him, in the former suit.

But, as is well said in the case of *Fortman v. Rottier*, 8 Ohio St. 550, the reason of the rule does not apply in the case of the suing out of a false and malicious attachment. The plaintiffs—

Digitized by Google

"Do not bring their action to recover for a malicious prosecution, strictly speaking, nor for the malicious and groundless instituting and prosecuting of a civil suit. They admit that they were indebted to Fortman [in this case Hinchman & Sons]; but they complain that, for purposes of more oppression, he [they] wantonly, maliciously, and without probable cause, by his own false affidavit, of an *ex parte* character, procured an attachment to be issued, under the statute, as auxiliary to his suit. That such a wrong will constitute a valid cause of action would seem reasonable. * * * Now, if the affidavit was false, * * * and if Fortman had no good reason to believe it true, there would be a clear absence of probable cause. But the subsequent proceedings in the cause would not, necessarily, involve an inquiry into the truth or falsity of this part of the affidavit [alleging acts done or about to be done with intent to defraud creditors]; nor would the final judgment at all determine this question. The existence of the debt,—which is all that the judgment ascertains,—does not, of itself, constitute probable cause for the attachment. The general principle seems to be that, when the termination of the former suit can neither tend to establish nor invalidate the plaintiff's cause of action, it is not necessary to aver such termination."

Nor is it necessary that the attachment must have been discharged or otherwise terminated in favor of the plaintiffs in the suit for malicious prosecution. The settlement of the debt by the plaintiffs, and the payment of the costs of the proceedings, upon the principles and for the reasons above stated, cannot prevent the maintenance of this action if the attachment was malicious and without probable cause. *Fortman v. Rottier,* 8 Ohio St. 551, 552; *Marbourg v. Smith,* 11 Kan. 554; *Bump v. Betts,* 19 Wend. 419; *Kinsey v. Wallace,* 36 Cal. 462; *Spaulding v. Wallett,* 10 La. Ann. 105; *Wall v. Toomey,* 52 Conn. 35, 38; *Morton v. Young,* 55 Me. 24.

It is claimed that the court erred in instructing the jury that there was a sufficient service of the writ to maintain a charge of abuse of process; that there was a sufficient service of the writ to maintain the action, and support the declaration, by the officers going into the store and maintaining pos-

Digitized by Google

session, or rather remaining there, until they were ordered away by the defendants. As previously stated, there was no error in this instruction. The act of the officers in going to the store with the writ, showing it to one of the plaintiffs, and remaining there for the purpose of preventing any goods going out of the store, must be regarded as a constructive service of the writ or taking possession of the goods.

The court also charged the jury that, as a matter of law, the attachment suit had come to a termination in favor of the plaintiffs. Although it cannot be considered that such suit had been terminated in favor of the plaintiffs (the defendants in that suit), yet, as heretofore shown, it was not necessary that the suit should have so terminated. Under the facts of the settlement, as shown by the evidence, the plaintiffs were entitled, under the authorities, to maintain this suit; such settlement being no bar to this action. Therefore no error was committed.

The instruction of the court as to probable cause is also complained of, but we cannot discern any fault in it, at least as against the defendants. The jury were informed, in substance, that probable cause would be such cause as the generality of business men of care and prudence would act upon under like circumstances; that the fact that the plaintiffs neglected to pay the debt, or were careless in the conduct of their business, would not be sufficient to justify the belief that they were about to dispose of or conceal their property with intent to defraud their creditors; that the probable cause to believe this must have been founded on competent evidence; and that, unless they found that the defendants did have probable cause to believe that the plaintiffs intended to do what the affidavit charged, then there was no probable cause for suing out the writ; and that, if they did not find the existence of such probable cause, they must also find, in addition, that the defendants acted from malicious motives in taking out the attachment; that it was not neces-

Digitized by Google

sary that there should have been any ill will or a purpose on the part of the defendants to injure the plaintiffs without cause; that if the prosecution was willful, wanton, or reckless, or against the prosecutors' sense of right or duty, or for ends which they knew, or were bound to know, were wrong, this would be malice within the meaning of the law.

This was as favorable to the defendants as they had the right to expect. The want of probable cause in itself raises a presumption of malice under the law.

There is no doubt that, if the defendants honestly believed that they had probable cause, the mere fact that there was not in reality any probable cause would not render them liable. But it was for the jury to determine whether they honestly believed that they had probable cause, and they could only determine this by ascertaining what careful and prudent business men would have done under like circumstances.

The jury were plainly enough notified and instructed that they must find that defendants did not have probable cause to believe the facts stated in the affidavit; and not only this, but they were further told that they must further find malice in addition to this want of probable cause. No one but the plaintiffs had a right to complain of these instructions.

The remaining objections are to the admission of certain testimony, and the refusal to strike out the evidence as to the barrel of glue, and the Wemple transaction, and the testimony of A. H. Dey.

The evidence in relation to the notice of the attachment suit being published in the Detroit Free Press, and the circulation of that paper, was admissible. It had a tendency to show the spreading at home and abroad of the fact that an attachment had been issued against the plaintiffs, which fact of itself is necessarily fraught with injury to the business of the persons so proceeded against. The publication of this item naturally injured the good name and credit of plaintiffs

Digitized by Google

as business men, which would detrimentally affect their business.

It was proper to show by Dey and others that their business reputation was good before the issuing of this attachment, and it was for the jury to say whether the Wemple matter, and the refusal to deliver the "barrel of glue" without payment before delivery, were the result of the attachment proceedings, or whether the refusal of credit was attributable to other causes.

We find no errors in the admission of testimony or in the charge of the court. The action was maintainable under the declaration, and the proof sufficiently supported the declaration. The case was fairly given to the jury, and their verdict must dispose of the cause.

The judgment is affirmed, with costs.

The other Justices concurred.

---

68 602
98 81

68 602
123 324

HIRAM EVANS AND HARRIET EVANS v. THE GRAND RAPIDS, LANSING & DETROIT RAILROAD COMPANY ET AL.

Injunction—Homestead—Equity pleading—Husband and wife—Contract for right of way.

1. An averment in a bill of complaint that complainants are living upon 40 acres of land, *which is their homestead*, necessarily implies that the land does not exceed in value $1,500
2. A contract giving a railroad company the right of way over land occupied as a homestead is void, as against such homestead, without the signature of the wife.
3. A railroad company claiming under a contract from a husband for a right of way over his homestead, not signed by the wife, of whose rights it will be presumed to be informed, by entering upon the land early in the morning of the Sabbath day, with a

Digitized by Google

large force of men, and tearing down a barn upon the premises, without reference to what effect the elements might have upon its contents, makes an aggravated assault upon the rights of the wife, for which there can be no excuse, and courts will not hasten, because of a few technical defects in a bill filed to enjoin such trespass, to uphold such a course of proceeding, or to so rule as to open the way for further violence in that direction.

Appeal from Ionia. (Smith, J.) Argued January 17 and 18, 1888. Decided March 2, 1888.

Appeal from an order granting an *ex parte* injunction, and from an order refusing to dissolve the same. Both orders affirmed. The facts are stated in the opinion.

Webster & Millard, for complainants.

R. A Montgomery and *Charles B. Lothrop*, for defendants.

MORSE, J. The defendants appeal to this Court from an order of Vernon H. Smith, circuit judge, granting an *ex parte* injunction, and from an order of the same judge denying a motion to vacate the same.

The injunction was obtained on the thirty-first day of October, 1887, upon the complainants' bill, alleging, in substance, as follows: That complainants are the owners in fee of a certain parcel of land in the township of Campbell, Ionia county, describing the same as 40 acres, upon which they have lived, occupying the same as a homestead, for a long space of time; that they now live upon and occupy the same as their homestead; and that their buildings are upon said homestead, including a barn, 100 feet long.

That the defendant railroad company has projected its line of road from Grand Ledge to Grand Rapids; and that said line, as surveyed, passes over and across the homestead lands of complainants, entering at or near the south-east corner thereof, and passing off from the same a short distance from the north-west corner of said premises, running through the barn used by the complainants in storing their

Digitized by Google

grain and other products, and as a shelter for their animals, and passing, also, within a very short distance of their dwelling-house; that said railroad company has neither purchased the right of way over said homestead, nor entered into any legal agreement to purchase, nor commenced proceedings to condemn, the same.

That said company, and the other defendants, who are contractors and subcontractors of the company, have been constructing the road-bed for said line of railroad, adjoining the homestead lands of complainants, in both directions, but until the thirtieth day of October, 1887, had not entered upon their premises.

That complainants posted notices in conspicuous places upon their premises to the effect that the said railroad company, and all persons acting in its behalf, were forbidden to enter upon the homestead lands, or any part thereof, for the purpose of constructing said road, and also gave like verbal notice to the agents of said company, and to their contractors.

"And your orator and oratrix further show unto the court that said railroad company, and said William McRae, and Michael Lally, and John M. Lally, agent of said firm of McRae & Lally, contractors, and Harry Mitchel, subcontractor and foreman of a crew or gang of workmen and laborers, and also one William Lusk, also some sort of agent for said contractors, in the employ of said contractors, or their agents and servants, unmindful of and not regarding the rights of your orator and oratrix in their said homestead lands, on Sunday, the thirtieth day of October instant, at an early hour in the morning, with a force of workmen, laborers, and servants in their employ, numbering somewhere near fifty persons, with about twenty teams, plows, scrapers, carts, wagons, wheelbarrows, and a great quantity of implements and utensils of all sorts and kinds used and employed by contractors and their workmen and laborers in excavating, filling, and constructing road-beds for the laying of iron for a railroad, entered upon the said homestead lands of your orator and oratrix, and began to plow, dig, and scrape and draw off the earth and soil of your orator and oratrix's said

Digitized by Google

homestead lands along the surveyed line of said proposed railroad; and entered the barn of your orator and oratrix on their said homestead lands, which is a building nearly 100 feet in length, and turned out all the animals of your orator and oratrix, which had been shut therein during the previous night, and carried out all the grain, hay, straw, and produce, and everything else which your orator and oratrix had stored therein, and put the same where they saw fit, and then tore down your orator and oratrix's said barn, and drew the materials off from the said proposed and surveyed line for right of way on said homestead lands, and deposited the same on said homestead lands outside of said proposed line of right of way; and committed great and serious damage and waste to the said homestead lands of your orator and oratrix by such digging, plowing, and scraping and carting away the said earth and soil along said proposed line of railroad over and across the same as aforesaid."

That complainants, as soon as they discovered this, went out where the defendants were at work, and forbade their entry upon the land, and from interfering with their barn, and digging and plowing up the soil, or from committing any further waste or trespass of any kind; but defendants "hooted and yelled," and wholly disregarded such warning and command.

That complainants are informed and believe that the survey and profile of said railroad line across their said homestead premises requires an excavation of the earth, or cut, from four to six feet in depth for nearly the entire length of said proposed line; and that such excavation or cut will cause irreparable injury and damage to their homestead lands, and nearly, if not quite, ruin the same for the purposes of a homestead; that said cut comes very near to the dwelling-house, and will, besides making a very dangerous place by reason of its proximity to their said dwelling-house, also destroy their said homestead lands, and the dwelling which is their home thereon.

That they are old people, very much advanced in years; that they purchased the said premises 22 years ago for the

Digitized by Google

purpose of making it their home, and have cleared it up almost from a wilderness, and there lived ever since as their home, and reared their children there, expecting and hoping to remain upon said premises and in said home, during their declining years, to the end of their lives.

That while they are possessed of 80 acres of land in all, 40 acres of which constitutes their said homestead, there is a mortgage of some $1,700 thereon, the interest of which for one year is due and unpaid.

That defendants threaten to go on and continue their waste and damage to said premises until their said proposed line across the same is constructed and completed, without regard to the rights of complainants.

The complainants further charge in their said bill of complaint that the—

"Said defendants sometimes pretend that they have an agreement with your orator for a right of way for the proposed line of their said railroad over and across the homestead lands of your orator and oratrix, and that by reason thereof they have a right to enter upon said homestead lands of your orator and oratrix for the purpose of constructing said road-bed for said proposed line of railroad, and to do and commit the waste, damage, spoil, and injury to the said homestead lands of your orator and oratrix, as hereinbefore mentioned and set forth; whereas your orator and oratrix charge the direct contrary thereof to be the truth, and charge that the said defendant railroad company has no agreement or article of any nature whatsoever, of any legal or binding force whatever, known to the law, entitling them to enter upon, or to commit any damage or injury whatever upon, the said homestead lands of your orator and oratrix; and that each and every of their acts, doings, trespasses, injuries, commission of waste, spoil, and other wrongs to your orator and oratrix, and upon the said homestead lands of your orator and oratrix, are willful and malicious, and done with the full knowledge that the same were done without the consent and permission of your orator and oratrix, and against their will, and with the intent, by threats, force, intimidation, and bulldozing, to drive your orator and oratrix to give up their rights and claims to their said homestead lands, and

Digitized by Google

because of their old age and enfeebled health, and ignorance of their rights, to compel them to surrender and convey the same to said railroad company at whatever price they may name.

"And the said defendants sometimes pretend that said proposed railroad is a great public improvement, and will be of great advantage to your orator and oratrix, and will increase the value of property in the vicinity along its proposed line; whereas your orator and oratrix charge the direct contrary thereof to be the truth, and charge that the increase of value of their neighbors' land is but poor compensation to them for the destruction of their home, for which they have endured the struggles, toil, and lot of the pioneer, to carve out for themselves from the wilderness, without reasonable and just compensation therefor.

"All which actings and doings, refusals and pretenses, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator and oratrix in the premises."

They further show that they have no relief save in equity, and ask an answer from the defendants, and pray an injunction to prevent the waste and damage alleged as threatened, and against entry of defendants upon their said homestead premises, and such further and other relief in the premises as the circumstances of the case may require.

On or about the tenth day of November, 1887, the defendants filed their answer; and upon the fifteenth of the same month a motion to vacate and set aside the order granting the injunction was argued and submitted in the circuit court for the said county of Ionia, in chancery, and said motion denied by the circuit judge thereof.

The grounds of said motion, as stated, were as follows:

"1. Because no cause is charged, and no grounds for equitable relief stated, in said bill of complaint.

"2. Because no exigencies are shown necessitating or authorizing the granting of an injunction.

"3. Because said bill of complaint shows upon its face that defendants were in possession of the property which the injunction granted seeks to dispossess them of.

"4. Because all the averments in said bill have been fully and fairly answered and denied under oath.

Digitized by Google

"5. Because there is no prayer for such process in said bill of complaint.

"6. Because, on the bill and answer filed, such order should be vacated and set aside. This motion is based on the records and files in said cause, including bill of complaint and answer thereto."

It is claimed by counsel for the defendants that the bill is fatally defective, in not alleging the value of the homestead sought to be protected; and they cite in support of their claim the case of *Shoemaker v. Gardner*, 19 Mich. 96. It was there held, on demurrer, that the bill was defective, because it did not aver that the value of the mortgaged premises, claimed as a homestead, did not exceed the sum of $1,500. The decree was reversed for this reason, but the case was remanded to the court below, with leave to the complainants to amend their bill. It does not appear that the bill stated the area of the mortgaged premises, or whether the same consisted of a farm or village property.

The averments in the present bill state clearly and explicitly enough that the complainants are living upon 40 acres of land, which is their homestead, and that the entry of the defendants was upon this 40 acres, and this homestead. There can be no doubt, from the statements of the bill, but that complainants claim the entire 40 acres as their homestead. Ordinarily, it seems to me, this would be equivalent to an averment that its value did not exceed the constitutional limit of $1,500.

The Constitution authorizes the selection and holding of a homestead in the country not exceeding 40 acres of land, not exceeding in value $1,500. Now, if one says,—

"This whole parcel of forty acres is my homestead, selected by me under the Constitution,"—

Would not that be considered by every one hearing the remark as an averment implying that the whole premises were not worth to exceed the constitutional limit? There is no necessity of any technicality of pleading, either at law or

Digitized by Google

in equity, in this age of liberality and advancement in the administration of justice. That averment is sufficient, either in a declaration or bill of complaint, which necessarily covers with its language the full information of the claim sought to be collected or enforced. The language of the pleader, in the bill of complaint before us, clearly imports that the whole 40 is claimed as a homestead, which necessarily implies that it is not worth over $1,500; and that, as plainly as if the fact itself were stated in words and figures.

The allegations, therefore, in my opinion, are sufficient to support the claim of a homestead in the premises described in the bill, and in the whole of them.

It is also insisted that the bill avers enough to show that the defendant corporation has some kind of a contract with the husband, Hiram Evans; and that, if it has, he might have the right, if he chose, to select his homestead upon another 40 acres which he owns adjoining the 40 upon which his house stands; and that the execution of the contract upon his part, granting the right of way through the 40 claimed in the bill as a homestead, may be considered as such a selection, or at least that he selects his homestead upon other land than that upon which the company has entered under his contract.

It appears from the record before us that the railroad company did have such a contract from the husband, before the defendants entered upon the premises, but that the wife did not sign it.

But, if the averments of the bill be true, the homestead had been selected before this contract was made, and for many years before. It has has never yet been held in this State that a selection of a homestead must be made in writing and recorded, or that any other particular formality must be gone into, in order to fix or preserve this right to a man and his family. The occupancy of the parcel by the placing of the dwelling-house thereon, and living within it, making

Digitized by Google

the home there, is sufficient of itself to declare it a homestead, and is notice to all of its selection. *Riggs v. Sterling*, 60 Mich. 643 (27 N. W. Rep. 705), and cases there cited. This homestead, so selected, and exempt under our laws, is not for the benefit of the husband alone, but for the use and protection of the wife and children as well. When once selected, it cannot be abandoned or alienated by the husband without the consent of the wife. See *Riggs v. Sterling, supra*, and cases cited.

It might have been better pleading if the complainants had set out in their bill the contract in full, or the substance of it, and then averred that it was void for want of execution by the wife; but it sufficiently appears from the bill that the contract held by the railroad company, if any, was one signed by Hiram Evans alone. It needs, therefore, only the averments that the premises are the homestead of the complainants, and that Harriet Evans is the wife of Hiram Evans, and that they were living upon the land, to show that such contract is void, as against the homestead, for want of her signature. These averments are found in the bill.

The bill shows an aggravated assault upon the rights of the wife. It matters not what contracts Hiram Evans has made, or what licenses he has given to the railroad company. It is to be presumed that they were informed of the rights of the wife in the premises; and the method of their procedure shows that they intended to run rough-shod over such rights. At the first break of the Sabbath, a large force enter upon this land, and tear down the barn upon the premises, without reference to what effect the elements may have upon its contents. The choosing of the Sabbath for this undertaking is evidence that the corporation had no such faith in its right to the premises that it was willing to submit its claims to the tribunals of the law; but rather that, conscious of the weakness of its title, it sought to gain possession of the

Digitized by Google

land before the authority of the law could be invoked to prevent it.

There can be no excuse for such conduct, under the showing of the bill; and courts will not hasten, because of a few technical defects in the bill, to uphold such a course of proceeding, or to so rule as to open the way for further violence in that direction.

The order of the circuit judge granting the injunction, and the order of the circuit court for the county of Ionia, in chancery, refusing to vacate the same, must stand, with costs against the defendants.

The other Justices concurred.

DAVID R. COOK v. JOHN T. CURTIS.

68 611
137 350

Covenant of warranty—Pleading—Ejectment—Notice to covenantor to defend—Damages—Consideration—Evidence.

1. The declaration in this case is held to be a sufficient declaration in covenant, and specific enough in its allegations to admit the necessary proof to support the plaintiff's action.
2. A notice to a grantor that a suit has been commenced against the grantee by declaration, giving date of service, and attaching a copy of the declaration to such notice, and requesting the grantor to defend the suit under the covenants of warranty in his deed of the premises described in the declaration, giving the date of the deed, is a sufficient notice in writing of the pendency of such suit, and that the grantor is required by the grantee to defend it.
3. Where, at the close of the trial of a suit for breach of covenant of warranty in a deed, the counsel for the defendant moved to strike out the evidence of the plaintiff relative to the service of notice on the defendant to defend the suit by which the plaintiff was evicted, on the ground that it was not set up in the declaration, and, in answer to a remark by the court that he did not understand him to question under his own evidence the *fact* of such service, repeated his former objection, and made no claim

Digitized by Google

of *non-service* on the trial, nor asked to have the question submitted to the jury, the court did not err in not submitting the question of service to the jury.

4. The consideration to be recovered in an action for breach of covenant of warranty is the sum *received* by the defendant for the land, and the recital in the deed is not *conclusive*, but he may show that in *fact* he received a *less* sum.

5. Where a grantor traded the land conveyed to a *third* party for *other* property, who traded it to the grantee for property the value of which was fixed at $800, which sum was named as the consideration in the deed, which by an agreement between the *three* parties, was executed *direct* to such grantee, in the absence of any agreement fixing the value of the property received by the grantor he may show its value, which will form the *real* consideration, but, if such value was agreed upon at the time of the execution of the deed, it will be taken as the real value.

Error to Allegan. (Arnold, J.) Argued January 18 and 19, 1888. Decided March 2, 1888.

Covenant. Defendant brings error. Reversed. The facts are stated in the opinion.

J. V. Rogers, for appellant.

Clement Smith and *William B. Williams & Son*, for plaintiff.

MORSE, J. Action for breach of covenant.

On the fourth day of February, 1879, the defendant executed and delivered to plaintiff a warranty deed conveying to him village lot No. 116 and the south half of lot No. 117, in the village of Plainwell, Allegan county, Michigan. The consideration of the deed was recited therein at the sum of $800. The covenants were that the parties of the first part were, at the time of the ensealing and delivery of the instrument,—

"Well seized of the above granted premises in fee-simple; that they are free from all incumbrances whatever; and that they will, and their heirs, executors, and administrators shall,

Digitized by Google

warrant and defend the same against all lawful claims whatsoever."

The declaration averred the execution and delivery of this deed for the consideration therein mentioned, and alleged further that the said premises were not, at that time, free from all incumbrances, and that the said defendant had not warranted and defended the same from all lawful claims whatsoever; that the plaintiff could not by the force of said deed quietly and peaceably possess said real estate; and that the defendant, though often requested so to do, did not defend the title to said premises.

He further avers that, at the time the deed was made, one Horace B. Peck had a valid and subsisting lien upon the premises, by virtue of a levy made thereon on a judgment rendered in the Allegan circuit court in favor of said Peck and against Mary R. Lasher, John H. Lasher, William Forbes, and Job Estes; that defendant's title was derived from said Estes after the levy; that afterwards said premises were sold under execution issued upon said judgment, and purchased by the said Horace B. Peck, and not redeemed by defendant, though he was often requested so to do; that Horace B. Peck, on the first day of November, 1885, evicted the plaintiff by due process of law, and entered upon, and has since held and now holds possession of, the same; by reason whereof the plaintiff has been compelled to pay the costs sustained by the said Peck in prosecuting an action of ejectment for the recovery of said real estate, and $100 expense in defending said suit, and has also been deprived of the real estate.

The defendant pleaded the general issue, and gave notice that he would prove under it—

1. That the levy was void on the ground that said Estes at the time owned and held the premises as a homestead.

2. Plaintiff negligently allowed the premises to be sold at a nominal price, and neglected to redeem the same, and then

Digitized by Google

negligently allowed himself to be evicted without any defense to said suit, when there was no legal claim against the premises.

3. That plaintiff made due search, and satisfied himself in regard to such title, before he purchased of defendant.

4. That the action, or supposed cause of action, did not accrue at any time within six years from the commencement of suit.

Suit was commenced February 11, 1886.

Upon a trial upon the issue thus made, before a jury, in the Allegan circuit court, the plaintiff recovered a judgment in the sum of $940.27.

The plaintiff, upon the trial, announced that he did not seek to recover upon the covenant against incumbrances or the covenant of seizin, but upon the covenant to warrant and defend against all lawful claims whatsoever.

The plaintiff's claim was that the levy of Peck was a valid one; that it had ripened into a title; that the plaintiff had been evicted from the premises in a suit brought by Peck against him under such title; that he gave defendant due notice to come in and defend such suit, and defendant neglected to do so; that he made the best defense he could, but was beaten, and lost the premises.

There are thirty-one assignments of error in relation to the introduction of testimony and the remarks of the court during the trial, and eight are directed against the charge of the court to the jury. These assignments need not be all noticed, as many of them relate to the same subject-matter, and some of them are of no importance.

The defense of the statute of limitations was based upon the proposition that, although the declaration purported to count in covenant, it was in fact a declaration in assumpsit. The declaration is a sufficient declaration in covenant, and is specific enough in its allegations to admit the necessary proof to support the plaintiff's action.

It is claimed that the defendant had no proper notice

Digitized by Google

served upon him to come in and defend the ejectment suit, and that he was not therefore debarred from contesting the validity of Peck's claim, levy, and other proceedings to obtain his title to the premises.

The suit was brought by Peck against Cook and one Pierson, who was claimed to be a tenant of Cook, and in possession. The files and records of the cause show that declaration was filed May 22, 1885. Copy of the same was served on Pierson May 21, 1885, one day before filing, and the sheriff's return shows that Cook could not be found in the county, and no service was made upon him. Cook, however, appeared in the suit July 21, 1885. It is argued that the service upon Pierson was premature and of no avail, and that the notice, if served at all, being served July 10, 1885, before Cook's appearance was entered, there was in fact no suit commenced at the date of such service.

Clement Smith, the attorney for Cook, testifies that a copy of the declaration was served upon Cook June 22, 1885, and the taxation of costs upon the judgment shows that fees were taxed for the service of the declaration upon Cook. Smith also testified to serving notice upon Curtis at the home of the latter. He swears that he saw Curtis on the tenth day of July, 1885, and told him about the suit between Peck and Cook, and served upon him the following written notice, handing and leaving the same with him:

"To JOHN T. CURTIS,
"Plainwell, Allegan County, Mich.

"*Sir:* You are hereby notified that Horace B. Peck has commenced a suit against me for the recovery of lot one hundred sixteen, in the village of Plainwell, in Allegan county, Mich., according to the recorded plat of the corporation of the village of Plainwell aforesaid. Said suit was commenced in the circuit court for the county of Allegan, Michigan, by filing a declaration. Service of a copy of said declaration was made on me on the twenty-second day of June last. Attached hereto is a copy of the declaration served upon me. You are requested and urged to defend

Digitized by Google

said suit under your covenants of warranty in your deed to me of the premises described in said declaration. Said deed bears date Febr'y 4, 1879. Yours, etc.,

"DAVID R. COOK,
"Hastings, Mich."

To which notice was attached a copy of the declaration in the case of *Peck v. Cook and Pierson*. Mr. Curtis, the defendant, testified that he remembered Mr. Smith's coming to his house, and having some papers with him, which he showed to witness. Could not say whether this notice, or a copy of it, was shown him or not. Did not recollect of Smith serving any papers upon him, or leaving any with him. To his best recollection he did not do so, and, if he had, the defendant would have laid them away with his other papers. Witness had no such notice in his possession, or among his papers.

Upon cross-examination he further said:

"I don't swear positively that you did or did not. I have no such paper, and I could not find any. I have no recollection of your leaving any such papers. If you did, I have not got them."

The only objection made to the admission of the service of this notice was that it was immaterial and irrelevant, and could not be admitted under the pleadings, and that, as no suit had been commenced, the notice would not bind Curtis to defend.

If the notice was served upon him with a copy of the declaration, as testified to by Smith, we think that he had sufficient and substantial notice in writing of the pendency of the suit, and that he was required by Cook to defend it.

It is further objected that the court took it for granted that the service of notice was made, and excluded the defendant's offered proofs tending to establish that the claim and levy of Peck was not lawful as against lot 116, which was claimed to be the homestead of one Estes at the time

Digitized by Google

the levy was made. Lot 116 was the only one involved in the ejectment suit.

Defendant claimed that he was entitled to attack the validity of Peck's proceedings to acquire title to this lot if no notice was served; and his counsel argues in this Court that the question of service should have been submitted to the jury, and his proposed testimony received, to be acted upon by the jury in case they found no notice served. But the court, treating the notice as a proper one, and as having been actually served upon Curtis, instructed the jury to find for the plaintiff, leaving to their consideration only the amount of damages.

Against this argument of the defendant the plaintiff's counsel raise the point that defendant's counsel, on the trial in the court below, impliedly admitted the service of the notice, as testified to by Smith, and raised no objection at any time to any want of proof to establish such service; nor did he at any time dispute the service.

The record shows that, at the close of the testimony, defendant's counsel moved to strike out the evidence relative to the serve of this notice, on the ground that it was not set up in the declaration. In the course of same remarks upon the motion, the court said:

"I do not understand you to make any question under your evidence but what it was served upon him."

Defendant's counsel replied:

"I make a motion to strike out the evidence in relation to the service from the fact that no notice is set up in the declaration. The declaration is not broad enough to receive evidence of that kind of a notice."

I have searched in vain in the record to find any claim made by defendant's counsel on the trial that this notice was not served upon his client, or that he desired the question of service to be submitted to the jury. And his answer to the query of the trial judge was such as to give him naturally to

Digitized by Google

understand that he made no question of the truth of Smith's testimony as to the service. His objections to this notice all the way through the trial were aimed at its admissibility under the pleadings. Upon this matter the court ruled correctly.

The defendant's counsel claims that, as to the matter of damages, he was not permitted to show the true consideration of the deed,—that it was less than the recital of $800.

It appears from the evidence that the consideration of the deed did not move directly from Cook to Curtis. The lots were sold by Curtis to one Cressy, who traded them to Cook for other property. By an agreement between the three Curtis deeded direct to Cook. The property that Cook let Cressy have was called $800, and that was called the amount of the consideration, and was so recited in the deed from Curtis to Cook.

The defendant's counsel, upon the cross-examination of Mr. Cook, was seeking to show this trade, and that the lots were paid for by Cressy, and that Cook did not pay anything to Curtis, but that he turned out property to Cressy for them.

Mr. Williams (plaintiff's counsel). "I object to how he paid it."

The Court. "I should be inclined to think the transaction might be shown. The deed is not conclusive as to the consideration."

Mr. Rogers (defendant's counsel). "I propose to show there was no money consideration; that it was in a trade, and he is sued here for a consideration of $800; that it was a trade, and no value was placed on the property at the time."

The Court. "That would not have any tendency to show that it was less than eight hundred dollars."

Mr. Rogers. "I propose to follow it up, and show that the value he received for it was not eight hundred dollars, or near eight hundred dollars."

Mr. Williams. "You have just stated it was a trade, and that you propose to show that he did not receive eight hundred dollars. That don't matter. That won't affect the con-

Digitized by Google

sideration. If he took it for eight hundred dollars, that is the point; not what Mr. Curtis got for the property that he received."

Mr. Rogers. "This man made a trade with Mr. Cressy in the first instance, and whatever Mr. Cressy allowed him for this property, or he allowed Mr. Cressy for it, has nothing to do with us. We never received anything from this man at all, in no way, shape, or manner."

The Court. "If that is the point, I will sustain your objection."

Mr. Rogers. "We take an exception. We propose to show it as bearing upon the consideration, and that, instead of deeding the property to Mr. Cressy, it was deeded to this man at Mr. Cressy's request."

This action of the court was error. The consideration to be recovered of the defendant was what he received for the land, not what plaintiff may have paid Cressy. The recital in the deed of the amount of the consideration was not conclusive upon the defendant. He was at liberty to show that in fact he received a less sum. It is apparent that he was not permitted to do so. The defendant offered to show that, at the time of the execution of the deed, no value was placed upon the property received by defendant from Cressy in payment for the land. If that was so, he was entitled to show the value of the property, and such value would form the real consideration. If, however, the value of the property so received for the land was agreed upon between the parties at the time, the general rule seems to be that such agreed value must be taken as the actual value. The defendant should have been allowed to establish, if he could, his claim that no value was put upon the property at the time, and that it was worth less than $800.

For the want of this opportunity a new trial must be granted, and the judgment below reversed, with costs. I find no other error in the rulings of the trial court.

The other Justices concurred.

Digitized by Google

68 620
114 824

68 620
s86NW 696
131 143

MERCHANTS' NATIONAL BANK OF CHICAGO v. DETROIT KNITTING AND CORSET WORKS.

Corporations—Authority of manager to accept drafts—Ultra vires—Evidence.

1. A corporate note given for an *individual* obligation is not given in the usual course of business, and is presumptively *ultra vires*. Special authority would be required, and persons taking such note must ascertain at their peril that such authority has been conferred. *McLellan v. Detroit File Works*, 56 Mich. 582.
2. The fact that the manager of a corporation was accustomed to make and discount its notes to raise money to meet its expenses has no tendency to prove his authority to accept *accommodation* drafts drawn upon it by another corporation in which the drawee had no interest; nor can it be held liable on such acceptances by reason of the entry upon its books, by the direction of said manager, of an account of such acceptances, without the direction or knowledge of its officers.

Error to Wayne. (Chambers, J.) Argued January 19, 1888. Decided March 2, 1888.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

George W. Bates, for appellant.

Corliss, Andrus & Leete, for defendant.

LONG, J. Plaintiff brought this action in the circuit court for Wayne county to recover against the defendant, a corporation, upon two accepted drafts—one for $1,500, and the other for $1,317.09—drawn by the Osgood & Wolfinger Manufacturing Company, of Chicago, and indorsed across the face: "Accepted. Detroit Knitting & Corset Works, S. Olin Johnson, Man."

The drafts were protested for non-payment. To plaint-

Digitized by Google

iff's action in assumpsit defendant pleaded the general issue, with affidavit attached, denying the signature of defendant corporation on the drafts, and also that they were not accepted or executed by defendant, or by any person authorized to accept them for it.

The only question involved in the case is whether S. Olin Johnson had authority to accept the drafts for the defendant corporation.

The Osgood & Wolfinger Manufacturing Company discounted these acceptances with Schaffner & Co., of Chicago, a firm of brokers, who afterwards discounted them with plaintiff.

The defendant is a manufacturing corporation, organized under the laws of this State, and stocked for $100,000, all of which was paid in. The stockholders were Homer Pennock, who held one share; J. E. Guilbault, one share; Franklin S. North, one share; David Pennock, one share; and S. Olin Johnson, who held 3,396 shares as trustee for Mrs. Pennock and her two sons, though he did not hold any shares personally, and had no other interest in the concern except as an employé. These parties constituted the board of directors. Homer Pennock was president; North, vice-president; and Johnson, secretary and treasurer.

The articles of incorporation did not define the powers of the board, nor provide for any officers.

To establish Johnson's authority to accept these drafts, plaintiff called him as a witness, and he testified that he was engaged as manager, under a written contract with defendant, during the year 1885, but the contract did not define his powers or duties; that he had supervision of the business, but did not have exclusive management; that he never had any written or express authority to make or sign paper for defendant; and that these drafts were given to the Osgood & Wolfinger Manufacturing Company purely for its accommo-

Digitized by Google

dation; and that he was a stockholder and interested in the Osgood & Wolfinger Manufacturing Company at that time. These drafts were entered upon the books of defendant corporation by the book-keeper, under his (Johnson's) direction. When he accepted the $1,500 draft in suit, he relied upon a telegram from one Keena, a stockholder in the Osgood & Wolfinger Manufacturing Company with himself, guarantying to protect him if he would accept it; and he received a telegram from Mr. Pennock, president of defendant company, not to accept it, before he had accepted it.

Upon cross-examination of the witness, he testified as follows:

"*Q.* They were for no indebtedness of the defendant corporation to this Osgood Manufacturing Co., who drew these drafts?

"*A.* No, sir.

"*Q.* Were they not purely accommodation drafts for this concern at Chicago?

"*A.* Yes, sir; purely.

"*Q.* And the arrangement was that they got this draft, and were to pay it themselves, or provide for it?

"*A.* Yes, sir.

"*Q.* And they did provide for the payment, from time to time, as they came due, by sending the money to enable you to pay them?

"*A.* Yes, sir.

"*Q.* And they did so until they struck these last ones, which have been sued upon?

"*A.* Yes, sir.

"*Q.* I will ask you if, as a matter of fact, these eight or ten drafts were not virtually renewals of each other, largely?

"*A.* I think all except the first one.

"*Q.* So they continued to have you accept other drafts as renewals?

"*A.* Yes, sir.

"*Q.* Until they finally failed? The defendant corporation did not pay any of them? That is what I mean by that.

"*A.* This statement shows that. * * * I told the book-keeper to keep a memorandum of them when they came due, so that we could look out for them."

Digitized by Google

This memorandum is produced, and is as follows:

Osgood & Wolfinger Mfg. Co. and Detroit K. and C. Works.

May 8.	Acceptance, 10 days	$1,600 00		May 21.	Cash	$1,600 00	
" 21.	" 2 months	$1,050 00		July 24.	"	$850 00	
June 5.	" 60 days	1,037 73		Aug. 6.	"	500 00	
				Sept. 12.	"	500 00	
	Balance	$237 73			Balance	237 73	
July 23.	Acceptance, 90 days	1,061 73		Oct. 24.	Cash	$354 66	
				" 24.	"	707 17	
	Balance	$237 63			Balance	237 63	
July 29.	Acceptance, 60 days	1 037 73		Sept. 30.	Cash	$237 73	
Nov. 27.	" 90 days	1,307 09		" 30.	Bills receivable	800 00	
Dec. 2.	Cash	800 00		Dec. 2.	Bills	800 00	
" 9.	Acceptance, 2 months	1,500 00					
		$4,882 45				$1,837 37	

It does not appear that the attention of the board of directors was ever called to this memorandum, or that they were ever consulted in regard to it, or ever knew that Johnson had accepted drafts in the name of the defendant corporation for the Osgood & Wolfinger Manufacturing Company; but, on the contrary, the directors being called as witnesses, each denies any knowledge of the transaction, and denies the authority of Johnson to accept accommodation drafts in the name of the company.

It does appear, however, that Johnson was accustomed, whenever defendant corporation was in need of funds to meet its expenses, to make notes at the People's Savings Bank at Detroit for such moneys. It is claimed by the plaintiff that this is some evidence of his authority to accept the drafts in suit. This fact could have no such bearing. These drafts were not made or accepted in the interest of, or for the benefit of, defendant corporation. They were purely for the accommodation of the Osgood & Wolfinger Manufacturing Company; and the fact that Johnson was permitted by defendant to draw money from the People's Savings Bank for the use and benefit of defendant, on notes made by him, would give him no authority to accept drafts for the accommodation of the Osgood & Wolfinger Manufacturing Company, or any other person.

Digitized by Google

A corporation note, given for an individual obligation, is not given in the regular course of business, but is presumptively *ultra vires*. Special authority would be required, and those persons who should venture to take such notes must at their peril ascertain that the special authority has been conferred. *McLellan v. Detroit File Works*, 56 Mich. 582 (23 N. W. Rep. 321).

It is also claimed that the defendant is to be held liable for the reason that its account with the Osgood & Wolfinger Manufacturing Company was carried on the books of the company. It appears, however, that this was done under the direction of Johnson, and it nowhere appears that it was done under the direction of the officers of the corporation, or with their knowledge.

We have carefully examined the record, which is voluminous, to find some evidence of authority in Johnson to accept these drafts, and bind defendant corporation, but the record contains no such evidence.

At the close of the trial, the court directed a verdict for defendant. Judgment being entered thereon, the plaintiff brings error.

We find no error in the record, and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

Digitized by Google

JOHN L. KINNIE v. L. M. BARE, DRAIN COMMISSIONER.

68 625
80 347
68 625
89 273
68 625
106 360
68 625
114 329
68 625
117 57
117 467
68 625
119 527
68 625
120 562
68 625
148 665
68 625
146 1 48
68 625
152 1261

Drains—Law of 1885—Petition to commissioner—Description of drain—Duty of commissioner—Condemnation.

1. In construing Act No. 227, Laws of 1885 (drain law), the following points are decided:

   a—The petitioners are not required to be *residents*, but only *freeholders*, of the township.

   b—The *course* of the drain may be described by its *center* line, on each side of which its width, and land in addition upon which to deposit the excavation, is described in the record of the survey, which description is sufficiently certain.

   c—The petition need not contain an accurate description of the *termini* and *route* of the proposed drain, which are to be approximately described for the information of the drain commissioner, who is to ascertain and determine the *practical* route and *termini* by the survey authorized by the act.

   d—After receiving the petition, the first duty of the commissioner is to personally examine the route of the proposed drain, and determine whether it is necessary and conducive to the public health that the application should be granted; and, if so, he is to cause a survey to be made, and, if he finds from such survey the drain to be practicable, he is to make his order of determination, in writing, in accordance therewith, and procure a release of the right of way and of damages from all those who are willing voluntarily to give it. Up to this point his proceedings are *ex parte*.

2. Drain laws which take from the citizen his private property against his will, can be upheld *solely* upon the ground that such drains are necessary for the public health.

3. The application for the appointment of commissioners to condemn land for the purposes of a drain, under section 5, chap. 3, of the drain law of 1885, must describe the land of *each* owner proposed to be taken with as much certainty as is necessary in a deed of conveyance of bargain and sale, and should contain such *data* that the *precise* location of each parcel of land may be found by the commissioners, and its area computed.

4. Where commissioners appointed by the judge of probate to condemn land under the drain law of 1885 are found to be interested or otherwise disqualified, the order of appointment may be

Digitized by Google

vacated and a new citation issued, the statute not providing for filling such vacancies, but requiring the judge to proceed *de novo*.

Error to Eaton. (Hooker, J.) Argued January 20, 1888. Decided March 2, 1888.

Certiorari to review proceedings establishing a drain. Petitioner brings error from order of circuit court affirming such proceedings. Reversed, and proceedings quashed. The facts are stated in the opinion.

Huggett & Smith, for petitioner.

Shriner & Fox, for respondent.

CHAMPLIN, J. Proceedings purporting to be instituted under Act No. 227 of the Public Acts of 1885 were taken for the purpose of laying out and establishing a drain in the township of Benton, Eaton county. A petition was presented to the defendant, as drain commissioner of the township, signed by five freeholders of the township, requesting him to locate and establish a drain substantially as follows:

"Commencing at about 84 rods north of the south-east corner of section twenty-three, in said township number three north, of range number four west; thence north-westerly across said section twenty-three, and north-westerly across the north-east quarter of section twenty-two, and ending at the Thornapple river, about 45 rods north of where the said river crosses the section line between sections sixteen and twenty-two."

It is alleged in behalf of plaintiff that this petition is insufficient to confer jurisdiction upon the drain commissioner to act, for the following reasons:

1. That the description is so indefinite as to leave it to him to determine the direction it shall take.
2. That it describes merely a line, instead of the land required for the construction of the drain.
3. That it states neither a starting nor ending point therefor.

Digitized by Google

4. That it is wholly void in not stating a description of the drain,—the beginning, the route, and the terminus thereof,—as required by law.

5. That it does not show the same to have been signed by five resident freeholders of the township of Benton.

Several changes were made in the act of 1885 from the laws previously in force relative to laying out and establishing drains. The present law is a new enactment, and all other laws inconsistent with it are repealed, saving rights and proceedings commenced thereunder.

Act No. 227 does not require that the petitioners shall be residents of the township; it is sufficient if they are freeholders thereof. The present law also contemplates that the course of the drain may be described by its center line. Chapter 2, § 8; chap. 3, § 3. The width of the drain, and land in addition upon which to deposit the excavation, is described on each side of this center line. Such description, under the law, is sufficiently certain.

It is not contemplated by the provisions of Act No. 227, nor is it longer necessary, that the petition for the drain should contain an accurate description of the *termini* and route of the proposed drain. It could not be well done without the petitioners first went to the expense of a survey, in order to determine the feasibility of the route. This the law does not require. What it contemplates is that the *termini* and route shall be approximately described for the information of the drain commissioner; and it is left for him to ascertain and determine the practical route and *termini*. To accomplish this, he is authorized to employ a surveyor, and it is made his duty to cause an accurate survey to be made, which shall embrace the *termini*, route, width, length, and depth thereof; and it is expressly provided that—

"In locating such drain the commissioner shall not be limited or confined to the precise starting point, route, or terminus set forth in the application." Chapter 3, § 3.

Digitized by Google

After receiving the petition, his first step is to proceed as soon as practicable, and personally examine the route of the proposed drain, and to determine whether it is necessary and conducive to the public health that the application should be granted; and, if it is, then he shall cause the survey to be made, and, if he finds from such survey the drain to be practicable, he shall then make his order of determination, in writing, in accordance therewith. His next step is to procure a release of the right of way and of damages from all those who are willing voluntarily to give it. Up to this point the proceedings are *ex parte* by the drain commissioner, and without notice to parties interested.

If any owner over whose lands the route of such drain is laid refuses or neglects for 20 days to release the right of way, then the law provides for the commencement of adverse proceedings to condemn the land for such right of way. Such proceedings can be authorized by the Legislature only under the police power of the State.

Drain laws which take from the citizen his private property against his will, can be upheld solely upon the ground that such drains are necessary for the public health. They proceed upon the basis that low, wet, and marshy lands generate malaria, causing sickness and danger to the health and life of the people; that when they are of such character as to injure the health of the community, they become and are public nuisances, which ought to be abated, and the Legislature have the right, under the police power inherent in every government, to protect the people from plague and pestilence, and to preserve the public health. But drainage for the purpose of private advantage, such as improving the quality of the land, or rendering it more productive or fit for cultivation, cannot be justified under the police power. Neither public convenience nor public welfare, independent of considerations of the public health, will justify the Legislature in the enactment of laws—

Digitized by Google

"For the construction and maintenance of drains, and the assessment of taxes therefor."

It is evident that where the public health is not affected by the existence of low, swampy land, the only object to be accomplished by their drainage is the improvement of the land itself. The State is prohibited from engaging in such schemes of internal improvement by Article 14, § 9, Const., which provides:

"The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property." *Ryerson v. Utley*, 16 Mich. 269; *People v. Salem*, 20 Id. 452; *Bay City v. State Treasurer*, 23 Id. 499; *Thomas v. Port Huron*, 27 Id. 320; *Hubbard v. Springwells*, 25 Id. 153; *Benjamin v. Improvement Co.*, 42 Id. 628 (4 N. W. Rep. 483); *Anderson v. Hill*, 54 Id. 477 (20 N. W. Rep. 549).

If private interests are solely involved, no authority exists in the Legislature to tax any person, either to compensate the owner for lands taken, or to pay for constructing the drain. *People v. Salem*, 20 Mich. 452; *Anderson v. Hill*, 54 Id. 477 (20 N. W. Rep. 549).

The Constitution has wisely placed a limitation upon the exercise of the police power for the purpose of taking from the owner his property under the exercise of the right of eminent domain. It is there declared that,—

"When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, * * * shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law." Article 18, § 2.

Consequently, when proceedings are instituted to establish a drain, if private property is to be taken therefor, it cannot be done until the commissioners appointed by a court of record, or the jury, if one is demanded, has, under the sanc-

Digitized by Google

tion of their oath, found that it is necessary to the public health that such drain should be constructed as described in the determination of the drain commissioner. This safeguard, if honestly observed by those in whom the trust is reposed, will be sufficient to protect the individual owner and the community to be taxed from perverting the law to merely private purposes. As was said in *Kroop v. Forman*, 31 Mich. 144,—

"In carrying out laws for condemning private property to public uses, it has always been held necessary to strictly observe every material requirement, and the courts have been equally constant in insisting that the proceedings should affirmatively show upon their face a substantial adherence to the course prescribed by the Legislature."

In the application in this case of the drain commissioner to the judge of probate for the appointment of three commissioners, the only description of the land of the plaintiff required to be taken is as follows:

"And your petitioner further shows unto the court that the following named person has neglected and refused to execute release of right of way and damages over and across the lands traversed by said drain, and owned by him, and placed opposite his name, viz., the south-west quarter of the south-west quarter of section fifteen, and the west half of the north-east quarter of section twenty-two, both in town three north, of range four west, said county, and owned by John L. Kinnie, a resident of said township."

The statute (chapter 3, § 5, subd. 3) requires that the application shall set forth the names of the persons, if known, who have not released the right of way and damages, the description or descriptions of land owned by each such person that will be affected by the drain, and the fact that they have each neglected or refused to execute release of right of way and damages. The plain meaning of the statute is that each parcel belonging to separate owners shall contain a description of the land proposed to be taken for the drain with as much certainty and particularity as is necessary in a deed of

Digitized by Google

conveyance of bargain and sale. It should contain such *data* that its precise location may be found by the commissioners or jury, and its area computed. This was held as long ago as *Kroop v. Forman*, 31 Mich. 144, where the description consisted of a line merely, and embraced nothing; and it was held a fatal defect. The present law does not aid the description in this respect, as the description contains no *data* showing at what point the center line crosses the boundaries of the land owned by plaintiff, nor its length upon his land. This defect was fatal, and the application conferred no jurisdiction upon the probate court.

The affidavit for *certiorari* sets forth that, on the day assigned for the hearing of the application of the drain commissioner for the appointment of commissioners, the judge of probate appointed as such commissioners George N. Potter, C. N. Streeter, and J. B. Hartwell, to meet on August 19, 1887; that, subsequent to the day appointing them, the names of George N. Potter and J. B. Hartwell were erased without notice to the plaintiff, and the names of Alva P. Claflin and George Hough were substituted therefor.

The drain commissioner, in his return to the writ of *certiorari*, anwsering this allegation, says:

"The court, having announced his order granting the application for the appointment of three special commissioners, in my absence filled out a blank order furnished him by me, therein inserting the names of George N. Potter, Cyrus N. Streeter, and Jerome B. Hartwell as suitable persons for such commissioners, but left the matter open until he had consulted me in relation thereto. In a short time I again saw the court, and then informed him that George N. Potter and Jerome B. Hartwell were the owners of lands liable to be assessed for the construction of said drain, and that George N. Potter owned lands traversed thereby, and that each were thus interested parties.

"That the court thereupon, and before such order became of record in the book of orders and decrees, appointed the following-named persons, viz., Richard Claflin, Cyrus N. Streeter, and George Hough.

Digitized by Google

"That Richard Claflin and Alva P. Claflin are one and the same person,—the correct name being Alva P. Claflin, but the name by which he is generally known is Richard, or Dick, Claflin, that the person who acted as such commissioner,—the Alva P. Claflin named in the notice served upon the said John L. Kinnie,—was the person intended by the said court to act therein; that no announcement of the names of the commissioners, or the time and place of their meeting, was made when the said John L. Kinnie was present, and for that reason the court caused to be added to such order that such notice be served upon him, the said Kinnie."

There is something singular in this proceeding. The citation issued by the probate judge was required by the law to be served upon every person whose lands were traversed, and who had not released the right of way, and upon every person who will be liable to be assessed for benefits in the construction thereof who is a resident of the town. Proof of service must be filed before the judge can appoint. It seems strange that, if J. B. Hartwell's name appeared as one served with notice, the judge should not have known it.

This instance discloses an obvious incongruity in the law. To every legal assessment there must be an assessing district, and this must be known and designated before the assessment can be apportioned and the burthen imposed. It cannot be left in the discretion of the assessing officer to enlarge or contract at his will,—to include within it, or exclude from it, lands, in his discretion, at the time he lays the burthen. This law nowhere provides for an assessing district, but leaves it to the drain commissioner to make out an assessment of benefits, covering lands in his discretion, without spreading them upon any specified district. He determines who and what lands shall be assessed for benefit; but the law does not specify when he shall so determine. He alone knows whom he is liable to assess. The law requires the citation to be served upon all such; but he is not required to make the assessment until the right of way is obtained, but before the letting of contracts to construct the drain.

Digitized by Google

The law expressly declares that—

"All assessments of benefits under the provision of this act shall be upon the principle of benefits derived."

The drain commissioner cannot, therefore, assess a parcel of land more than the benefits it derives from the construction of the drain. How can he determine this question before he has ascertained the entire cost and expense? He must know the entire sum to be assessed before he can intelligently or honestly apportion the per cent. which each is benefited and should pay of such sum.

If it were a conceded fact in each case that the benefits derived would exceed the entire cost and expense of the drain, then, possibly it might be assessed by a percentage, whether the cost and expense would be much or little. The true test to be applied when assessing for benefits is, how much more is the parcel assessed worth in the market after the improvement is made than it was before? The difference is the benefit derived. The drain may benefit the parcel assessed by taking off the water and rendering it more fit for agricultural purposes. Land that can be cultivated and cropped is better and more salable than wet, swampy, and sour land. It has a real substantial difference in value in the market. This difference is the benefit derived from the construction of the drain. One man's land may be improved in value by the construction of the drain, and his neighbor's may not be enhanced in value one dollar. One is subject to be assessed for benefits, and the other is not. It is difficult to see how an assessment for benefits derived can be laid according to a percentage.

This digression has led me away from the point under consideration, but before resuming I wish to say that I express no opinion upon the validity of the law authorizing assessments for benefits in the construction of drains, as the question was not argued in this case.

Digitized by Google

The statute requires the appointment of commissioners to be made upon citation. This is for the purpose of affording opportunity for those interested to make such objections to the prior proceedings as they see fit, as well as to object for cause to the selection made by the judge of probate. The commissioners must be disinterested men; and if it should turn out, after the appointment was made, that one or more were interested or otherwise disqualified, the judge of probate would undoubtedly have authority to vacate the order appointing them, and issue a new citation for the purpose of appointing three qualified commissioners. The statute does not provide for filling vacancies in emergencies such as this. The result is, the judge, if he has acquired jurisdiction, must begin *de novo*. Parties interested have a right to be present and be heard; and, if this can be evaded by appointing in the first instance disqualified persons, and, after the order is made and the parties departed, make an entirely or partially different appointment, the provision for citation and hearing is useless.

There are facts set up in the return which imply that Mr. Streeter was not entirely disinterested. It appears that, at the request of Mason Lett, the drain commissioner took a blank form of the petition for the drain in this case to Mr. Cyrus N. Streeter, and that he drew the application. He had thus taken an active part in starting the proceedings. In drawing the application he made the mistake of locating the northern terminus—

"At the Thornapple river, about 45 rods north of where the said river crosses the section line between sections *sixteen* and twenty-two."

There is no line between these sections; they corner upon each other. The Thornapple river crosses the line between sections fifteen and twenty-two. The word "sixteen," where it should have been "fifteen," is plainly an error, and was discovered on the day the commissioners were appointed by

Digitized by Google

the probate court after Mr. Kinnie had left, and the papers were corrected and amended in his absence.

I think the error was merely clerical, and the application would have been sufficient without the correction. The location of the Thornapple river, with regard to section twenty-two, forms a known boundary or monument, and the drain was described as running north-westerly across the north-east quarter of section twenty-two, and ending about forty-five rods north of where the river crosses the section line of twenty-two. The word "sixteen," being impossible of application, may be stricken out.

For reasons stated the proceedings must be quashed.

The other Justices concurred.

68 635
76 517

THE CITY OF DETROIT v. EMILY S. CHAFFEE.

Proceedings for widening street—Condemnation—Award of damages.

The award to defendant of the *full* value of the land taken for street-opening purposes is affirmed. See *City of Detroit v. Daly, ante,* 503.

Appeal from recorder's court of Detroit. (Swift, J.) Argued January 20, 1888. Decided March 2, 1888.

Appeal from award in street-opening case. Award affirmed. The facts are stated in the opinion.

John W. McGrath, city counselor, and *William S. Sheeran,* city attorney, for appellant.

Hoyt Post and *Otto Kirchner,* for defendant.

Digitized by Google

MORSE, J. In the proceedings in this case the jury awarded to one Emily S. Chaffee the full value of a strip of land of which she held the record title. All the land that she owned was taken, and therefore, under the Detroit street-opening act, the jury were instructed by the recorder that she must be awarded the full value of it, without any offset because of benefits. The jury awarded her $15,000 for one piece taken, and $3,000 for the other, one-half of which sum, under the law, is to be assessed against the city, and the other half against the property benefited.

The city of Detroit appeals from this award, and claims that the title to this land was placed in Mrs. Chaffee's name for the express purpose of committing a fraud upon the city in the proceedings.

The claim of the city is that when the proceedings were commenced, in June, 1885, the trustees of the homeopathic hospital held the title and owned the property between John R. street and the west line of the Brush farm, which included the land for which Mrs. Chaffee received this award of $3,000.

The record showed that this land was conveyed by Amos Chaffee and the said Emily S. Chaffee, his wife, to certain persons as trustees, and in trust for the Detroit Homeopathic Hospital Association, the land reverting, if the trust was not performed, to said grantors. The deed was executed July 12, 1879.

March 7, 1887, the persons named as trustees in said deed conveyed to Emily S. Chaffee, by quitclaim deed, the northerly 50 feet of this land, said 50 feet being the strip designed to be taken by the opening or widening of Willis avenue, and on the same day the same parties also deeded the balance of the land to Amos Chaffee.

The city offered to show that on the twelfth of March, 1887, Amos Chaffee and his wife, Emily S. Chaffee, executed and delivered to the persons executing such deeds, as such trus-

Digitized by Google

tees aforesaid, a contract in writing, by which contract they agreed that, as soon as Willis avenue was widened, they would execute and deliver to such persons as trustees for said homeopathic hospital association a good and sufficient deed of all the premises excepting the fifty feet standing in the name of Emily S. Chaffee.

By the same contract Amos Chaffee agreed to pay any sum charged upon said land as benefits, provided Emily S. Chaffee was permitted to receive the damages which might be awarded for the taking of the 50 feet aforesaid.

The city claimed that these conveyances from the association to Mr. and Mrs. Chaffee were made in fraud of its rights, and in collusion between the trustees and the Chaffees for the purpose of enabling the trustees to avoid assessment, and Emily S. Chaffee "to pocket" the damages for the 50-foot strip.

The judge of the recorder's court refused to admit the contract in evidence, and instructed the jury to award to Mrs. Chaffee the full value of the strip taken as damages.

We fail to see any substantial damage to the city by this ruling. Mrs. Chaffee has only received the value of the land taken, which she or someone else was entitled to. The benefits to the adjoining land, standing in the name of Amos Chaffee, have been assessed against the same, presumably in the proportion it ought to bear of one-half of the expense of opening the street, for the damages awarded by such opening. It ought not to have borne any more than this, if the whole parcel, including the 50 feet, had remained in the name of the hospital association trustees.

What the city contends for, however, is that if the property had all stood together, as in the beginning, in the name of one person or corporation, the jury might, under the practice and the ruling of the recorder's court in like cases, have found the value of the 50-foot strip, and then deducted the benefit to the balance of the property from such value, and,

Digitized by Google

after having done this, also assess the same for the benefits. Under such a course of procedure they might have found, perhaps, as in other cases reviewed by us at the present term of this Court, that the net compensation or damage for taking this strip was nothing, and yet assessed benefits against the balance of the land. This we have decided cannot be done, in several cases. *City of Detroit v. Daly, ante,* 503 (37 N. W. Rep. 11); *City of Detroit v. Sauer,* 69 Mich. —— (37 N. W. Rep. 18); *City of Detroit v. Ledyard,* Id. —— (37 N. W. Rep. 19); *City of Detroit v. Heintz,* Id. —— (37 N. W. Rep. 19); *City of Detroit v. Beecher,* Id. —— (37 N. W. Rep. 17).

It therefore follows that no error was committed in the rulings of the judge of the recorder's court for the city of Detroit. If the street is opened or widened, and the land taken, the award of damages must stand and be paid to Emily S. Chaffee. In any event she will recover the costs of this Court.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred.

SHERWOOD, C. J. I concur in the result.

Digitized by Google

MARTIN L. SWEET v. WILLIAM HALDANE.

Statute of limitations--Suspension of operation by suit in equity.

1. Until 1857, proceedings in equity did not operate to stay the operation of the statute of limitations.
2. The object of How. Stat. § 8738, is to prevent a debtor who has sought to remove litigation into the jurisdiction of an equitable tribunal, and stay or prevent legal proceedings, from getting any advantage in a suit at law by the delay which his own action in equity has caused; and it does not make any equitable suit suspend the running of the statute except where instituted or prosecuted on behalf of the same person who wishes to plead the statute.

Error to superior court of Grand Rapids. (Parrish, J.) Argued January 24, 1888. Decided March 2, 1888.

Covenant. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Norris & Norris, for appellant.

Blair, Kingsley & Kleinhans, for defendant.

CAMPBELL, J. Plaintiff sued defendant on the personal covenants of a deed covering property in Grand Rapids, dated May 1, 1874. This action was begun in December, 1885. After the introduction of a large mass of testimony, the court below submitted the facts to the jury, who found for defendant on the merits, under a charge which, upon the law points, was quite favorable to plaintiff. He brings error upon the charge and some other rulings. Upon the argument in this Court, defendant's counsel depended, as in the court below, on the effect of the statute of limitations as rendering all other questions unimportant, as would neces-

Digitized by Google

sarily be the case if the statute is a bar. The suit was begun more than ten years after the breach of covenants relied on, and this defense must prevail unless suspended by chancery proceedings.

The proceedings in question were a foreclosure bill filed by defendant, on a purchase-money mortgage, and a cross-bill, filed by plaintiff, relying on alleged frauds committed by defendant in connection with the sale, and, also, upon the same causes of action now sued on. All of this was put in to operate as a defense, so far as it should go, to the foreclosure. This litigation continued down to a period which would have very much shortened the ten years in question.

Until 1857, proceedings in equity did not operate to stay the operation of the statute of limitations. But in that year, by an act embodied in section 8738, How. Stat., it was provided that—

"The time during which any case in chancery, commenced by any debtor, has or may be pending and undetermined, shall not be computed as constituting any part of the period limited or prescribed by any statute of limitations in force at the time of the commencement of such case in chancery, prescribing the time within which an action in relation to the debt or subject-matter in dispute, as set forth in the proceedings in such case in chancery, should or might be commenced."

The object of this statute is very clear. It is meant to prevent a debtor who has sought to remove litigation into the jurisdiction of an equitable tribunal, and stay or prevent legal proceedings, from getting any advantage in a suit at law by the delay which his own action in equity has caused. It does not make any equitable suit suspend the running of the statute except where instituted or prosecuted on behalf of the same person who wishes to plead the statute. Until this act was passed there was an object in procuring such delays, and gaining time, which might make the statute operate to bar a suit to which there was no honest defense. But where

Digitized by Google

the plaintiff at law is the complainant in equity there is no such operation to stay the statute.

Mr. Haldane, the defendant here, never commenced any proceedings in equity to stay or affect his liability on these covenants. His bill to foreclose was merely to collect his purchase money. The litigation involving these covenants was a cross-action in its nature, begun by plaintiff and not by defendant, who opposed instead of urged its retention in the court of equity. Defendant never sought relief there against his covenants, but claimed that the transaction should stand as made.

The chancery proceedings had no effect on plaintiff's right of action, and consequently it is now barred.

The judgment must be affirmed.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred. CHAMPLIN, J., did not sit.

LEVANT E. WHITE, ADMINISTRATOR, ETC., v. ADALINE NEWHALL.

68 641
119 868

Subrogation—Loan of money to pay mortgage.

One loaning money to a mortgagor to pay the mortgage under an agreement from him to secure the repayment of the loan upon the mortgaged premises, which he fails to do, will be subrogated in equity to the rights of the mortgagee to the amount of the money loaned and interest thereon.[1]

Appeal from St. Joseph. (Pealer, J.) Argued January 24 and 25, 1888. Decided March 2, 1888.

Bill filed by an administrator under How. Stat. § 5884.

[1] See *Bush v. Wadsworth*, 60 Mich. 255.

Digitized by Google

Decree below reversed, and bill dismissed, but without prejudice, etc. The facts are stated in the opinion.

H. P. Stewart (*J. W. Flanders* and *John B. Shipman*, of counsel), for complainant.

A. M. Graham (*H. H. Riley*, of counsel), for defendant.

MORSE, J. The bill of complaint in this case is filed under section 5884 of Howell's Statutes, which reads as follows:

"When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall in his life-time have conveyed any real estate, or any right or interest therein, with the intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty to, commence and prosecute to final judgment any proper action or suit, at law or in chancery, for the recovery of the same, and may recover, for the benefit of the creditors, all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover for all goods, chattels, rights, or credits which may have been so fraudulently conveyed by the deceased in his life-time, whatever may have been the manner of such fraudulent conveyance."

It appears without dispute that Charles E. Newhall was married to the defendant in 1872. They lived together as husband and wife until February 3, 1884, when he died. The widow, on the twenty-first day of April, 1884, was appointed administratrix of his estate. On the twelfth day of March, 1886 she was removed from the trust, and the complainant appointed in her stead.

Before the death of Charles E. Newhall, and in April, 1883, his mother, Mary Newhall, commenced an action at law against him in the circuit court for St. Joseph county. The suit was pending when Charles died. The suit was revived, and Adaline Newhall made defendant as administratrix of his estate. On the twenty-ninth day of January,

Digitized by Google

1885, judgment in such suit was recovered in favor of Mary Newhall for the sum of $2,452.68 damages, and $54.95 costs, which judgment was duly certified to the probate court of St. Joseph county.

When Charles E. Newhall died he left no appreciable personal estate, and no real estate was held in his name. There have been no claims proven against his estate, excepting this judgment in favor of his mother.

Soon after the marriage of Charles E. Newhall to the defendant, and in January, 1873, Mary Newhall deeded to the defendant a house and lot in Sturgis at a recited consideration of $4,000. Mary Newhall claims that she deeded in the first place to her son, who afterwards came and wanted a new deed to rectify some mistake in the old one. She executed a new deed, but supposed it ran to Charles; did not know it was executed to his wife. Adaline Newhall denies this, and claims the deed was executed directly to her in the first place. This house and lot, some three or four years thereafter, was sold for $2,900.

The land in controversy in this suit, to wit, the south half of the south-west quarter, and the west half of the south-east quarter, of section 25, township 7 south, of range 9 west, in St. Joseph county, was purchased April 3, 1878, and deeded by the owner, D. Etta K. Bowen, to the defendant. The deed was not recorded until January 30, 1882. A mortgage, however, for $1,600 was given back upon the premises, and recorded April 5, 1878. One thousand dollars was paid for the land at the time the deed was made, said sum of money being obtained by the sale of a piano to Mary Newhall, and the turning out to her by Charles of a mortgage which he owned of about $600. The piano was purchased originally by Charles, but the defendant claims that at the time it was sold to his mother it was her property. Charles E. Newhall, when this land was purchased, had no creditors to interfere with his giving the premises to his wife.

Digitized by Google

The theory and claim of the bill of complaint is that at the time of the death of Charles he was the equitable owner in fee of the land in controversy; that he contracted the debt for which the judgment was rendered, and borrowed the money, $1,875, for the express purpose of paying the balance of the purchase price, to lift and discharge the mortgage upon the same; that he represented to his mother, Mary Newhall, that he held the title by contract, and that, if she would loan the money to him, he would, as soon as he could procure his deed, execute to her a mortgage upon the premises to secure such money; that his mother, relying upon such statements, on the first day of April, 1879, loaned him the money, stated in the bill to be $2,075, but shown by the proofs to be $1,875; that these statements were false, and made for the purpose of defrauding his mother; that the deed to his wife, and the withholding it from record until 1882, was a part of the fraudulent scheme to deceive and cheat his mother, and that the defendant had knowledge of and participated in the fraud; that the money borrowed was used to pay and release this mortgage, and that thereby the land was cleared free from all incumbrances, and the legal title left standing unincumbered in the defendant; that Charles paid all the consideration that was ever paid upon the purchase of said real estate; that Mary Newhall had no knowledge of the deed being in the name of Adaline Newhall until long after the money to pay the mortgage was borrowed of her; that the defendant has no right or interest in the premises which she is holding and enjoying; that the same is the property of the estate of Charles, and subject to the payment of his debts.

The defendant denies that she ever heard or knew of the alleged statements of Charles to his mother, or that she had any part whatever in any fraud committed upon her.

Upon pleadings and proofs in the case the circuit court for

Digitized by Google

the county of St. Joseph entered a decree, in substance, as follows:

1. That Mary Newhall is a creditor of Charles' estate to the amount of her said judgment and interest.

2. That the defendant holds the title of record to the premises, but that she holds the same for the benefit of Charles' creditors; and that the same and every part thereof are liable for and chargeable with the payment of Mary Newhall's judgment, and are appropriated for that purpose.

3. Adaline Newhall is enjoined and restrained from setting up, asserting, or claiming any right, title, or claim to said premises, or any part thereof, either in law or equity, as against the said claim of Mary Newhall or the enforcement of the same, or against any purchaser of the same at probate sale, except her dower right as the widow of Charles; and this injunction is made perpetual.

4. Costs are decreed complainant.

It is plain that this decree cannot stand as it is. There is $1,000 in the premises upon which neither Mrs. Newhall nor any other creditor has any claim. The most that Mary Newhall can claim under her own proofs is a lien upon the premises for the payment of the $1,875 loaned Charles, and the interest thereon.

But the question arises, whether under the bill filed in this cause the complainant is entitled to any relief. There is no doubt from the proofs but Mary Newhall loaned Charles E. Newhall $1,875 to pay the mortgage, and that he promised to secure her by a mortgage upon the land. Enough of this money so loaned was used to pay this mortgage as was necessary to pay $1,600 and the accrued interest thereon for about one year. It is also apparent that defendant knew where this money came from, and that the mortgage was paid and discharged by it. Mary Newhall ought in equity to be subrogated to the rights of the mortgagee, and has a lien upon the premises for the amount of the mortgage and interest.

But can this lien be recovered and enforced by the administrator of Charles E. Newhall in this proceeding? The

Digitized by Google

administrator, the complainant in this cause, has no authority or right to file this bill except in a case covered by the statute. He can go no further than the statute authorizes. It is doubtful if he can reach by this proceeding lands conveyed as these premises were, not by his intestate, but by a third party.

The statute in terms only authorizes him to proceed where the deceased shall have conveyed in his life-time, any real estate, or right or interest therein, with the intent to defraud his creditors, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors.

In this case there was no conveyance by the deceased, but the deed of the land sought to be subjected to the payment of his debts by this process, was executed by a stranger to the defendant, and that, too, at a time, when the deceased had no creditors who could complain of such a deed, even if the purchase money was furnished by the deceased and not by the defendant. It certainly does not come within the strict letter of the statute.

But it is not necessary in this case to pass upon this question. We are not satisfied from the proofs that Charles E. Newhall had any intention of defrauding his mother at the time he procured the $1,000; and we are convinced that the defendant was guiltless of any fraud at that time, or had any intent then to afterwards defraud her husband's mother.

The case is therefore one, to make the best of complainant's proofs, where the mother was deceived and defrauded by both the husband and wife to advance money to them to discharge a mortgage by a promise to give her security for her loan upon the land, which promise was never fulfilled, and perhaps not intended to be performed when made. Her rights, therefore, are those of the mortgagee, whose lien she lifted and released. She is subrogated and succeeds to her rights under the mortgage to the amount of the money belonging to her used to discharge the same, and the interest

Digitized by Google

thereon. But with this claim the administrator of Charles has no concern, nor does the statute authorize him to interfere.

It appears in the proofs that during the life-time of Charles, and on the twenty-sixth day of April, 1881, Mary Newhall filed a bill of complaint in the circuit court for the county of St. Joseph, in chancery, against Charles E. Newhall and Adaline Newhall, his wife, averring substantially the same fraud alleged in the bill in this cause, and the promise, unfulfilled, of a mortgage to secure her loan, and praying, among other things, for a lien upon these same lands to pay her debt. This suit seems to be still pending and undetermined. It seems to us that in this first bill the proper relief was sought by Mary Newhall, and that her remedy lies in that direction.

The bill of complaint in this cause must be dismissed, with costs of both courts, but without prejudice to the rights of Mary Newhall to enforce her equitable lien upon the premises under her bill above mentioned, or in any other proper proceeding.

The other Justices concurred.

Digitized by Google

68 648
74 44
68 648
81 78
68 648
80 292
68 648
837NW 34
130 547

THE PEOPLE v. HORACE WHITE.

Criminal law—Plea in bar—Jeopardy—Discharge of jury.

1. The judgment in this case is affirmed, on the ground that the plea in bar sets forth that the cause was dismissed and the jury discharged by the court upon the respondent's motion.
2. When a respondent is discharged by his consent, express or implied, a subsequent plea in bar must set forth the *cause* of such discharge, in order that the court may be advised whether it was by the consent of the respondent or not, and for such *reasons* and under such *circumstances* as will amount to an acquittal.

Error to Cheboygan. (Ramsdell, J.) Argued January 26, 1888. Decided March 2, 1888.

Respondent was convicted of rape, and sentenced to State prison for 15 years. Judgment affirmed. The facts are stated in the opinion.

Watts S. Humphrey, for respondent.

Moses Taggart, Attorney General, for the People.

SHERWOOD, C. J. The respondent was tried and convicted of the crime of rape, in the Cheboygan circuit, on the thirtieth day of September, 1887, and on the third day of October following he was sentenced to the State prison for the period of 15 years, where he is now serving out the sentence.

It appears from the return to the writ of error that a complaint was made by the injured female, and that both it and the warrant were taken out on the twenty-eighth day of September, 1887, and the plaintiff was arrested thereon and taken before the justice issuing the papers. Here he appeared by counsel and in person, and moved the court to discharge him—

Digitized by Google

"On account of having been acquitted of the self-same offense in said complaint and warrant charged, in the circuit court for said county, September 28, 1887."

This motion was overruled, and the defendant waived further examination, and the justice held him for trial at the circuit.

On the twenty-ninth of September, 1887, the defendant was arraigned upon an information charging him with the offense stated in the complaint, and, when asked for his plea, he filed what he claims to be a plea of a former acquittal of the same offense in bar, which was duly verified, and reads as follows:

"STATE OF MICHIGAN.

"*In the Circuit Court for the County of Cheboygan.*

"THE PEOPLE vs. HORACE WHITE.

"And the said Horace White, in his own proper person, comes into court here, and, having heard the said information, says that the said people ought not to further prosecute the said information, because, he says, that heretofore, to wit, at a circuit court holden at the village of Cheboygan, in said county, on the twenty-eighth day of September, A. D. 1887, it was presented that the said Horace White, then and there described as Horace White, with force and arms, at the township of Benton, county of Cheboygan, State of Michigan, in and upon one Mary Miller, a female of the age of ten years or more, to wit, of the age of fifteen years, then and there being, violently and feloniously did make an assault, and her, the said Mary Miller, then and there, by force and against her will, feloniously did ravish and carnally know.

"And the said respondent, Horace White, having been duly arraigned at the bar in open court, and the information having been read to him by Henry G. Dozer, prosecuting attorney, stood mute and refused to plead thereto, whereupon the court ordered a plea of not guilty to be entered in said cause, which was accordingly done.

"The respondent in said cause being present and trial ordered, thereupon came a jury, to wit, Robert Braham [and 11 others], who were duly impaneled, tried, and sworn, well and truly to try and true deliverance make between the people of the State and the prisoner at the bar, whom they shall have in charge, according to the evidence, and laws of this State; and after one witness being sworn and examined, whereupon, on motion of the defendant's attorney, the cause was dismissed, and thereupon the jury was discharged by the court without rendering a verdict in said cause, as by the record

Digitized by Google

thereof more fully and at large appears, which judgment still remains in full force and effect, and not in the least reversed or made void.

"And the said Horace White in fact says that he, the said Horace White, so informed against and acquitted as last aforesaid, are one and the same person, and not other and different persons, and that the felony of which the said Horace White was so informed against and acquitted as aforesaid, and the felony of which he is now indicted, are one and the same felony, and not other and different felonies, and this he, the said Horace White, is ready to verify.

"Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said information specified, and as to the felony of which the said Horace White now is informed against, he, the said Horace White, says he is not guilty thereof, and of this the said Horace White puts himself upon the country. HORACE WHITE.

"WATTS S. HUMPHREY,

"Attorney for Defendant."

After filing the same, the circuit court directed the plea of not guilty to be entered for the defendant, and the trial proceeded to verdict and judgment as above stated.

Three errors were assigned upon the record:

1. That the court erred in not compelling the prosecuting attorney to join issue on the defendant's plea, by demurring or replying to the same, and directing a trial thereof.
2. The court erred in not discharging the defendant on said plea, the same not having been replied to or held bad on demurrer.
3. The court erred in disregarding the defendant's plea, and ordering the plea of not guilty to be entered for him, and compelling him to go to trial without first trying the issue tendered by the defendant's plea.

We do not think this record discloses any error. The respondent places himself upon purely technical grounds. The record, brief as it is, discloses the fact that in the former case there was no trial upon the merits, and while it appears the jury were sworn, and one witness was called and examined, it does not appear that any verdict was taken, or on which side the witness was sworn and examined.

It is not averred in the plea, nor does it appear elsewhere in the record, that the information in the first suit was a

Digitized by Google

valid one. It is not easy to see, under the plea as it stands, how the respondent can be held to have been in jeopardy in the former prosecution. He himself asked for the action of the court taken in that case, and a verdict was not included in the proceedings.

The case cannot be ruled, as claimed by the respondent's counsel, by that of *People v. Jones*, 48 Mich. 554 (12 N. W. Rep. 848). In that case the jury were impaneled and sworn and the people put in their testimony and rested; in other words, they had made their case against the respondent; and he was then discharged by the court, which very properly held he had been in jeopardy, and that a verdict of the jury was not important on the question. No such action, however, is shown to have been taken in this case by the people.

We do not think it was necessary for the prosecuting attorney to have filed a replication to the plea or taken the ruling of the court thereon before going to the jury with the case. The respondent could have shown upon the trial in defense against conviction the facts he claims if the effect was to acquit. 2 Bish. Crim. Law, § 1027; Rosc. Crim. Plead. § 179; *Walton v. State*, 3 Sneed, 687; *Joy v. State*, 14 Ind. 139; *People v. Casborus*, 13 Johns. 351; *State v. Garvey*, 42 Conn. 232; *State v. Norvell*, 2 Yerg. 24; *Gerard v. People*, 3 Scam. 362; *People v. Pline*, 61 Mich. 247 (28 N. W. Rep. 83); *People v. Gardner*, 62 Id. 307 (29 N. W. Rep. 19); *State v. Parker*, 66 Iowa, 586 (24 N. W. Rep. 225); *State v. Champeau*, 52 Vt. 313; 2 Whart. Crim. Law, § 591.

At the opening of last term, on motion of the Attorney General, an order was taken directed to the circuit judge before whom the cause was tried, requiring him to return to this Court certain proceedings alleged to have occurred in the court below, when the first prosecution was dismissed, and which it was claimed ought to be considered in disposing of the question raised upon this record. Return has been made to that order, but we find nothing therein con-

Digitized by Google

tained which can be properly reviewed in this Court, on this record.

The writ of error brings into this Court such matters only as appear of record at the circuit, and any of the rulings of that court occurring upon the trial, in the proceedings had, in the disposition of motions not carried on to the record, or not made a part of the record by bill of exceptions, cannot be returned under the writ. If motions other than those relating to the testimony are made and decided, the action of the court therein is proper to be entered upon the record of its proceedings in the case. If this has not been done, and it is deemed important that they should appear in the return after a writ of error is issued, an order may be properly made by this Court directing the correction of the record in this respect, and, when the action of the court has been properly entered upon the record *nunc pro tunc*, such corrected record may be brought into the case in this Court by writ of *certiorari*.

We have not considered the matter returned under the order made further than was necessary to ascertain the fact that it contains nothing properly in the case.

The judgment must be affirmed.

CAMPBELL, J. When this case was argued, I was very much inclined to think there was error in the record. But I am satisfied that none distinctly appears.

I do not think it right to deprive a prisoner of a substantial right on any mere formality, and, had he put in a plea showing an acquittal on the merits, I think the jury should have been sworn to try it, and that the record should show this.

There is no doubt that, after a jury has been sworn to try a prisoner on a valid indictment or information, he is thereby put in jeopardy, and his discharge after that will be a bar to a future trial on the same charge, unless made in some one of the ways which can legally be resorted to and save the

Digitized by Google

process or avoid the bar. Among admissible causes of discharge are a void indictment, or information insufficient to sustain a conviction, the breaking up and discharge of the jury for some valid reason, and perhaps some other causes.

The strict rule requires the plea to show in some way, by recital of the record or by some kind of averment, enough to indicate what the real state of the old trial was, or else some reference to the former record should be made, by production or otherwise, so that it can be readily seen on what the prisoner relies. Lord Hale, who was a very fair judge, points out the necessity of some degree of care to prevent delays and abuses by sham pleas. 2 Hale, P. C. 241, etc. And it seems also that the defendant should plead over to the felony at the same time, although failure to do so will not deprive him of that right when his plea is decided against him. Archb. Crim. Pl. 89, 90. But there is not, according to Mr. Archbold, any need of an immediate replication or other answer by the prosecutor, and the jury should be sworn and try the issue, on which defendant has the burden. Id.

As our practice allows a bill of exceptions, I think that, whatever may be the form of the plea, it should appear in some way that defendant offered to prove his plea if not demurred to, and the court refused to allow it, and required the trial to proceed on the merits, before error will be presumed. This should certainly be the case unless the plea sets out the old proceedings so specifically as to show a clear case. This practice is far more likely than any other to prevent injustice both to the prisoner and to the people. The plea before us is certainly ambiguous, and does not make a showing at all specific which is not just as consistent with a discharge of the old jury for some cause not touching the merits as any other, and, if defendant desires to rest on his plea alone, he has the burden of making a good and full showing. If he had demanded a trial on it, and fault was found with

Digitized by Google

the plea, it would have been wrong not to allow an amendment according to the facts, inasmuch as the public is interested in maintaining constitutional rights. But a bad plea on which no relief was asked will not do as a basis of reversal.

I concur in affirmance.

CHAMPLIN, J. I concur in affirming the judgment in this case, upon the ground that the plea in bar sets forth that the cause was dismissed and the jury discharged by the court upon the respondent's motion.

When the discharge is procured by the consent, express or implied, of the respondent, the plea must set forth the cause of such discharge, in order that the court may be advised whether it was by the consent of the defendant or not, and for such reasons and under such circumstances as will amount to an acquittal. We have held that, if the jury were discharged by the consent of the accused, it will not operate as an acquittal. *People v. Gardner*, 62 Mich. 307 (29 N. W. Rep. 19).

MORSE and LONG, JJ., concurred with CHAMPLIN, J.

Digitized by Google

68 655
s36NW 792
s18ASR 373
d131 71

THE PEOPLE v. HENRY L. CLEMENTS.

Criminal law—Resisting officer—Levy of attachment upon exempt property.

There is no law in this State which permits a sheriff or other officer under any writ to take from a debtor his only team, wagon, and harness, worth less than $250, while engaged in the business of farming, and the debtor is not obliged to submit to such trespass without *reasonable* resistance.

Error to Livingston. (Newton, J.) Argued January 27, 1888. Decided March 2, 1888.

Respondent was convicted of resisting an officer in the service of a writ of attachment, and sentenced to nine months' imprisonment. Judgment reversed and prisoner discharged. The facts are stated in the opinion.

Luke S. Montague, for respondent.

Moses Taggart, Attorney General, and *William P. Van Winkle*, prosecuting attorney, for the People.

SHERWOOD, C. J. The respondent was informed against in the Livingston county circuit court for resisting the sheriff in his attempt to serve a writ of attachment.

The property attempted to be taken consisted of a pair of horses, wagon, and harness, whiffletrees, and two horse-blankets. The respondent claimed them as exempt and not liable to levy upon attachment or execution, and insisted upon his right to use so much force as was necessary to prevent the sheriff from taking the property from him, and that he used no more.

On the trial the respondent was convicted, and afterwards

Digitized by Google

sentenced to nine months' imprisonment. The prosecution was had under How. Stat. § 9257, which reads as follows:

"If any person shall knowingly and willfully obstruct, resist, or oppose any sheriff, coroner, township treasurer, constable, or other officer or person duly authorized, in serving or attempting to serve or execute any process, rule, or order, made or issued by lawful authority, or shall resist any officer in the execution of any ordinance, by-law, or any rule, order, or resolution made, issued, or passed by the common council of any city, board of trustees, or common council or village council of any incorporated village, or township board of any township, or shall assault, beat, or wound any sheriff, coroner, township treasurer, constable, or other officer duly authorized, while serving or attempting to serve or execute any such process, rule, or order, or for having served or attempted to serve or execute the same, or shall so obstruct, resist, oppose, assault, beat, or wound any of the above-named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts, and efforts to maintain, preserve, and keep the peace, every person so offending shall, on conviction thereof, be punished by imprisonment in the State prison not more than two years, or by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars."

The writ of attachment, under which the sheriff attempted to make the service, ran against the defendant and his wife. Mrs. Clements was acquitted upon the trial.

No question seems to have been made but that the property belonged to the wife; that it was their only team, wagon, and harness, and that they were carrying on agricultural pursuits as their principal business when the property was seized. It nowhere appears in the record that any appraisal of the property was ever made, and the testimony all shows that it was worth less than $250. It is true, the sheriff says he thought it was worth more than that, but it required a consultation with the plaintiff in the attachment to reach that conclusion. The fact that the property was not worth $250 is established by a sale made of the same under an execution for $162.

Digitized by Google

At the close of the trial the defendant's counsel made the following requests to charge:

"1. The team, wagon, and harness, which the sheriff sought to take from defendants in this case, are exempt from levy and sale on execution, and he had no right to take them from their possession, and defendants had a right to use such reasonable force as was necessary to prevent the sheriff from taking such property from them; and, having such right, they are not guilty under the statute of resisting the sheriff in the service of process, unless you find they use more force than was necessary for that purpose.

"2. It was the duty of the sheriff, when he went to serve the papers, to inform the defendants of the nature of the process he held against them, and ascertain whether they claimed the team as exempt; and if you find he did not do so, but immediately proceeded to take the team from their possession, in disregard of their right to hold it as exempt, they were fully justified by the law in using sufficient force to prevent his taking it."

The court refused to give these charges, but, referring to the subject, said to the jury:

"The team, vehicle, the harness, and other things must relate to the occupation or business of the person claiming the exemption. They are exempt when, in the language of the statute, 'they enable such person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged,' and they shall not exceed in value two hundred and fifty dollars.

"As public officers are presumed to act honestly and faithfully in the discharge of their duties, I am of the opinion, and so I charge you, that the Legislature never intended that the debtor should be the judge of his own case, and enforce his own judgment by physical force upon the officer before he had made a levy and before he had made an inventory, and before he had had time to make an appraisal, or had time to determine whether or not the debtor came within the class of persons who are entitled to an exemption of any kind. * * * The law affords a peaceful tribunal, to which men may resort to have determined all their grievances, where the question of exemption can be tried by the court and jury.

"No doubt there are cases of hardship growing out of that requirement of the law, but the law, rather than have a

Digitized by Google

breach of the peace, have life threatened, limb endangered, will compel exempt persons necessarily to suffer some inconvenience by resorting to process of law, and this is the only safe tribunal in our society and under our civilization which can be relied upon."

To the refusal to give the foregoing requests, and to the giving the subsequent paragraph noted, defendant's counsel excepted.

We think the exceptions are well taken. The requests should have been given upon the undisputed testimony. There is no law in this State which permits a sheriff or other officer to take from a debtor his only team, wagon, and harness, worth less than $250, while his business is farming and he is engaged therein, whether he has process against the debtor or not. No writ in this State authorizes the sheriff to levy upon such property, and, when he does it, it is at his own peril. The law will not protect him in doing that which it has expressly commanded him not to do.

Neither is the debtor compelled to submit to such trespass without reasonable resistance. If the doctrine contended for by the prosecution, and laid down in the charge, were to obtain, every poor debtor would be at the mercy of the sheriff and constabulary of the county, and the statutory benefits intended by the exemption would be of little avail. No officer can be legally authorized to invade private rights in any such manner. It is quite enough that property liable to be seized may be taken from the debtor before trial and judgment.

The judgment at the circuit must be reversed, and the prisoner discharged.

The other Justices concurred.

Digitized by Google

68 659
118 352
68 659
137 292

THE BOARD OF SUPERVISORS OF SANILAC COUNTY v. THE AUDITOR GENERAL.

Swamp lands—Interest upon proceeds of sales—Taxes—Constitutional law—Title of act—Gift.

1. On a review of the swamp-land legislation of this State, the Court are unable to find any ground upon which a *mandamus* can issue to compel the payment to the relator of its proportion of the tax ordered to be levied in 1886 by Act No. 222, Laws of 1885, for interest money alleged to be due on sales of swamp lands, as the share belonging to said relator.
2. The proviso in section 2 of Act No. 222, Laws of 1885, directing the levy and collection of taxes to pay the amount due the several counties for interest on the so-called "Swamp-Land Fund," is not covered by the title to the act, and is void.
3. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—Courts have no power to pass upon the disposition of the proceeds arising from the disposal of the swamp lands granted this State by Congress, or to review the decision of the Legislature concerning the extent of the necessity for the use of such proceeds or of said lands for the purpose of reclaiming the lands by levees and drains.

   b—Considering the counties in their *corporate* capacity as the intended beneficiaries, which is at least not clear, the swamp-land legislation up to 1885 was nothing more than an intended gift not carried out.

   c—A gift resting merely in intention, even though accompanied by a promise, could not be enforced against an individual, and is still less binding on the public.

   d—There can be no question of the right to recall any merely proposed gift so long as it remains in the hands of the giver.

   e—There can be no doubt of the power of the State Legislature to refuse to perform even a contract, and, where it forbids the application of money in the State treasury to any particular use, no court can interfere.

   f—The State is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure.

Application for *mandamus* to compel the payment of inter-

Digitized by Google

est alleged to be due relator on the "Swamp-Land Fund," so called. Argued January 26, 1888. Denied March 2, 1888. The facts are stated in the opinion.

Isaac Marston and *John Atkinson*, for relator.

Moses Taggart, Attorney General (*C. A. Kent*, of counsel), for respondent.

CAMPBELL, J. The application in this case is for a writ of *mandamus* to compel the Auditor General to issue his warrant on the State Treasurer for the proportion alleged to be due to the board of supervisors for the county of Sanilac out of the tax ordered to be levied in 1886 for interest money alleged to be due on the sales of swamp lands, as the share belonging to the board of that county.

The Auditor General, in response to an order to show cause, insists not only that no duty is cast upon him by law to ascertain and pay over such share, but also that the law has, as it now stands, given no money that can be so applied. Neither the application nor the returns shows just how much of the special tax levy has been collected, and one of the questions raised is in what manner and by whom it shall be determined what the share of each county is.

The legislation referred to on the argument requires attention in its consecutive dates and order.

In 1850 Congress granted certain swamp lands to the states containing them, with absolute power of disposal, imposing the duty of using as much of the proceeds or of the land as should be necessary for the purpose of reclaiming the lands by levees and drains. 9 Stat. at Large, 519.

It is not claimed that courts have any power to pass upon the disposition of these proceeds, or review the decision of the Legislature concerning the extent of that necessity.

In 1857 the previous swamp-land statutes were revised to some extent, and by section 9 of the new statute it was pro-

Digitized by Google

vided that 25 per cent. of the proceeds should constitute a drainage fund—

"For the purpose of aiding the counties in which the lands sold may lie, the interest of which, at the rate of seven per cent., shall be, in pursuance of law, appropriated to drain such of the said lands as are situate in the county, and which, in the opinion of the supervisors, are capable of drainage, and can be profitably drained, and shall not have been sold under the provisions of this act."

The balance of proceeds was directed to be made a part of the primary-school fund, and considered as loaned to the State, at an interest of seven per cent., which interest was to be paid into the primary-school fund annually, and the principal applied to paying the State debt. Laws of 1857, p. 236, § 9.

By this law the drainage fund and its interest became subject to future disposal. There was no present disposition made of the interest, and no other law disposed of it. The policy indicated, which was vague, seemed to contemplate future action by the State, based on information or action of the supervisors.

In 1858 a new swamp-land act was passed, and by section 5, after deducting expenses of sale, 50 per cent. was to be denominated a primary-school fund, and 5 per cent. interest thereon appropriated and distributed "in like manner as the primary-school fund of this State." The other 50 per cent. was to be denominated a swamp-land fund,—

"And the interest thereof, at 5 per centum, shall be paid over annually to the order of the board of supervisors of the several counties, in the proportion in which the same is received from the sales in said counties, respectively, to be used as said board shall direct, in draining and reclaiming swamp lands in said county."

The principal moneys were to go in payment of the State debt. Laws of 1858, p. 171, § 5. It is to be observed that this law covered past as well as future receipts.

Digitized by Google

The relators rely on this statute as creating a vested right, which they claim to have been furthered by subsequent legislation, as will be hereafter explained.

It will be observed that this law does not purport to make any gift to the counties as such, so that the interest money should become a part of the proprietary funds of the county. The use of the money was confined to the specific purpose of drainage. Under this law the primary-school moneys were sufficiently provided for and appropriated, as they were to be applied under the general laws on that subject. But there was no other legislation helping out county drainage, or giving directions concerning the collection and disposal of this drainage interest money, and none was ever collected, unless under a subsequent law of 1885, which is relied on, and which will be presently referred to.

In 1863 the Superintendent of Public Instruction applied to this Court for a *mandamus* to compel the Auditor General to account to the primary-school fund for 75 per cent. of the swamp-land moneys, and of the value of swamp lands specifically disposed of without sale. This application was based on the claim that by the law of 1857 the primary-school fund obtained a vested right in that proportion of the swamp lands and their proceeds, which could not be divested by subsequent legislation; and this claim was further rested on the ground that the State Constitution expressly exempted that fund from violation. *People v. Auditor Gen.*, 12 Mich. 171. This Court, however, held that, so far as the constitutional provision was concerned, it applied only to lands granted to the State expressly for educational purposes, and that the swamp lands were not so granted. It was held that the State might dispose as it saw fit of the proceeds of sales made thereafter. No point was raised beyond this, as the question would have been theoretical.

On June 10, 1885 (Laws of 1885, p. 245), an amendatory clause inserted in section 5 made that portion of it now under consideration read as follows:

Digitized by Google

"The interest thereof at five per centum shall be paid over annually to the order of the board of supervisors of the several counties, in the proportion in which the same is received from the sales in said counties, respectively (out of the general fund of the State)."

This was the first legislation providing any fund out of which the interest money should be paid. But thus far the statutes had not imposed any specific duty upon any public officer, so far as we are informed, whereby the proper calculations should be made and communicated to the financial officers of the State, so as to give them the necessary *data* to act upon, or to make their duty of distribution specifically ascertainable. And the record does not inform us, but denies, that there was any established official routine to supply the deficiency. This defect was sought to be supplied by the general appropriation bill of the same session, which, however, is objected to as insufficient for that purpose. Laws of 1885, p. 303. This act is entitled—

"An act making appropriations for the expenses of the State officers and State government for the years eighteen hundred and eighty-five, and eighteen hundred and eighty-six, and to provide a tax for the payment of the same."

The first section of this act provided for a tax of $892,399.90 for 1885, and $599,375 for 1886, for the payment of State salaries, and other State government expenses, for those years. This section contained a proviso that no payments should be made to counties under the swamp-land act, as amended by that Legislature, as before set forth, "until a tax is levied and collected for that purpose." That amendatory act, although ordered to take immediate effect, was passed but a few days before, and it is not claimed, and could not be claimed, that it had set apart any portion of the existing general fund for any such purpose, if it was competent to do so under the appropriation laws which raised it. This general appropriation law of 1885, after this prohibition in section 1, proceeded to provide for a special tax for the spe-

Digitized by Google

cific purpose of paying to the counties the sums due them under the law of 1858, and section 2 is relied on, with its proviso, as furnishing that fund, and as authorizing the application now made to us. The proviso to that section, following the general and usual directions to the Auditor General as to the apportioning the State tax levy among the counties, reads as follows:

"And provided further, that there shall be levied and collected in the same way as herein provided, and in addition to the sums hereinbefore named, the further sum of fifty-seven thousand three hundred and thirty-three and two-thirds of a dollar, for the year eighteen hundred and eighty-six, and a like sum each year for five successive years thereafter, to pay the amount now due to the counties, as provided for in said section fifty-three hundred and ninety-four, and denominated therein as a 'Swamp-Land Fund.'"

This section is as numbered by Howell, and is section 5 of the swamp-land law of 1858.

Under this proviso in section 2 of the appropriation bill of 1885, the sum mentioned was levied in 1886, and collected with the other State taxes, but how much of it was actually realized does not appear.

On April 27, 1887, the supervisors of Sanilac drew an order on the State Treasurer for the moneys in the State Treasurer's hands belonging to the county. A copy of this order is not given, but it was meant to cover any money in his hands. He referred it to the Auditor General, who refused to draw his warrant. In the letter of refusal it was stated that no apportionment had been made, and the Auditor's office had no *data* for making one, and it did not appear that the Auditor was the proper officer to make it.

On the sixth of June, 1887, an act was passed, which, as published, appears to have been given immediate effect, requiring the Auditor General to credit back to the counties the money apportioned for collection for interest on the swamp-land fund. It is claimed this act had not been

Digitized by Google

given immediate effect under the Constitution, and did not become operative until 90 days after the close of the session, which was 20 days after this application was sworn to on the seventh of September. The application was filed, and order to show cause granted, October 4, 1887, after all the session laws became operative, and the dates do not seem to be very important, if the State can pass such a law at all.

The practical importance of this case has led us to consider it in all the bearings suggested on the argument, and we are unable to find any ground on which we can issue the writ prayed for. There are difficulties touching both right and remedy.

If we consider the county in its corporate capacity as the intended beneficiary, which is at least not clear, the legislation up to 1885 was nothing more than an intended gift not carried out. It was in no sense a contract, for there was nothing to base a contract upon. A gift resting merely in intention, even though accompanied by a promise, could not be enforced against an individual, and is still less binding on the public. There can be no question of the right to recall any merely proposed gift so long as it remains in the hands of the giver. Had the State made provision whereby it was the express duty of a State officer to pay over the money, there would perhaps be a remedy to compel it, so long as the State left the law unchanged.

But there can be no doubt of the power of the State Legislature to refuse to perform even a contract, and, where it forbids the application of money in the State treasury to any particular use, no court can interfere. The State is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure. This is such elementary doctrine that it only needs statement. Our own decisions, and those of the United States Supreme Court cited on the argument, dispose of any question of that sort.

The act of 1887 expressly requires the taxes which had

Digitized by Google

been collected for the counties to be credited back to the counties where they were levied, and the State officers have no power to make any other use of this money.

There is also much force in the claim that none of the laws, from 1858 down, have furnished the means of securing the collection and distribution of this fund, or have made it the express duty of any one, enforcible by the courts, to proceed in the business efficiently.

But we need not dwell upon this. The law of 1887 requiring these taxes to be refunded, while it gives no reasons, leads to a plain inference that for some reason or other the Legislature regarded them as improper or illegal, and it makes no difference which. Possibly both reasons existed. It was certainly a peculiar practice to compel the whole State, which is forbidden to engage in internal improvements except in applying land grants, to raise money to be expended by particular counties in local improvements.

But, however this may be, there can be no question whatever that the law of 1885 was void on other grounds. The title of the act, according to our Constitution, limited its object to the appropriations for the expenses of the State officers and State government for the years 1885 and 1886, and to provide a tax for the payment of the same. The second section proviso is designed to raise money to pay an old debt,—if it can be called a debt,—including arrearages for 27 years, and having nothing to do with the expenses of the State government for the two years in question. The Legislature, in the act itself, declared that this formed no part of the governmental appropriation, when, after providing for taxes to a specified amount for each of those years, they prohibited the use of any moneys for the counties until a tax should be levied for that particular purpose. And when they determined, by some process not pointed out, but probably on information from the departments, how much the arrearages amounted to, they went on to divide them into six

Digitized by Google

installments of $57,333.66 each, and required that sum to be raised each year for six successive years, beginning with 1886. All of this was clearly outside of anything in the title of the act. The tax thus collected was illegally collected, and was properly refunded on that account. But the courts could not compel it to be retained or paid over to the counties against the direction of the Legislature, whether rightly or wrongly withheld from them.

The difficulties in the way of our interference are, therefore, substantial as well as formal. The State does not owe this money to the county of Sanilac, and the respondent has no right to pay it over.

The *mandamus* must be denied. From the peculiar nature of the dispute we do not feel disposed to award costs.

The other Justices concurred.

Digitized by Google

Digitized by Google

INDEX.

Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ACQUIESCENCE.

After an acquiescence in the division and partition by the heirs of an estate for twenty years, it is too late for one of them to disturb or impeach it. 106.

ACTION—See PARTNERSHIP (2); TENANTS IN COMMON; TRESPASS.

ADJOURNMENT.

The three months for which a justice of the peace may adjourn a case date from the return-day of the process by which suit was commenced. 84 (2).

See CRIMINAL LAW (6).

ADVERSE POSSESSION.

In an action of ejectment, title by adverse possession may be shown under the general issue. 76 (1).

See STATUTE OF LIMITATIONS (2).

AFFIDAVIT—See ATTACHMENT SUIT (1, 3); CERTIORARI.

AGENT—See PRINCIPAL AND AGENT.

ALIMONY—See DIVORCE.

AMENDMENT—See VARIANCE.

APPEAL—See JUDGMENT.

ARREST—See CRIMINAL LAW (8, 9).

ASSESSMENT—See CONDEMNATION PROCEEDINGS.

ATTACHMENT SUIT.

1. An affidavit for attachment against *two* defendants, which

Digitized by Google

ATTACHMENT SUIT.—Continued.

avers that said defendants (naming them) are justly indebted to the plaintiff, is sufficient to support evidence of a *joint* indebtedness, and is a sufficient compliance with the statute. 153 (1).

2. A delay of two months in levying an execution, after legally issuable, is not unreasonable, and will not release an attachment levy. *Id.* (2).

3. In *Borland v. Kingsbury*, 65 Mich. 59, it was held that personal service of a writ of attachment and inventory would not give jurisdiction if the affidavit was insufficient. 451 (1).

4. A justice's writ of attachment does not operate as a summons, and personal service of the writ, unless made after levy and accompanied by the statutory inventory, is insufficient to give jurisdiction over the defendant. *Id.* (2).

5. The action of an officer in going to the store of a defendant in an attachment suit, and showing him the writ, and remaining in the store for the purpose of preventing any goods being taken therefrom, must be regarded as a constructive service of the writ or taking possession of the goods. 590 (3).

See MALICIOUS PROSECUTION.

ATTORNEY FEES—See BILLS AND NOTES (1); JUDGMENT.

BILL OF EXCEPTIONS—See CRIMINAL LAW (3).

BILLS AND NOTES.

1. A written promise to pay a certain sum of money at a fixed date, "and attorney's fees," is not a promissory note. 287 (1).

2. The certainty requisite to the negotiability of an instrument must continue until the obligation is discharged, and any provision which before that time removes such certainty prevents the instrument being negotiable at all. *Id.* (2).

3. An agreement made at the time of the execution and delivery of a promissory note, to be performed *before* its maturity, and forming its *real* consideration, is a part of the transaction, and, as between the parties, its performance is a condition precedent to the enforcement of the note; and a purchaser of the note before maturity, and before a breach of the agreement, but who has seen it, and is acquainted with its relation to the note, is bound the same as if the agreement was attached to the note or written upon the same piece of paper. 303 (*a*).

4. A maker who says to a proposed purchaser of his note that it is all right, and that he will pay it at maturity, is estopped,

Digitized by Google

BILLS AND NOTES.—Continued.

after its purchase in reliance upon such statement, from asserting a failure of consideration, or pleading any other invalidity against the note. *Id.* (*b*).

5. To defeat a recovery by the holder of a promissory note purchased before maturity, he must be shown to have had knowledge of such facts and circumstances as would make his taking the paper with the intention of enforcing it an act of bad faith. 389 (4).

6. After proof that a promissory note, transferred before maturity, was fraudulently obtained of the maker, the burden of proof is upon the transferee to show that he is a *bona fide* holder for value. *Id.* (5).

7. A representation made by the payee in a promissory note, to the maker, that a so-called association, of which the payee claimed to be superintendent, was a corporation organized under the laws of this State, and in behalf of which he executed a bond or obligation, which formed the *real* consideration of the note, and without which it would not have been given, if *false*, will defeat a recovery by the payee upon the note, or by a purchaser before maturity with notice of such false representation before paying for the paper. 454 (2).

See MARRIED WOMAN (1); RAILROAD AID NOTE.

BILL TO QUIET TITLE.

Where a bill was filed to quiet the title to lands, and dismissed on general demurrer, prior to Act No. 260, Laws of 1887, taking effect, the Supreme Court may sustain the bill under said amendatory statute, if it states facts entitling the complainant to equitable relief and is properly filed as a bill to quiet title. 220 (1).

BILL TO REDEEM—See EQUITY PRACTICE (2).

BOARD OF SUPERVISORS.

The board of supervisors have a considerable discretion in giving pay for services on which the law is silent, which must be exercised by them, and not by this Court, if a proper case in their judgment arises; but the specified fees, over which they have no discretion, should not be made to include anything not fairly within their terms. 330 (3).

BOHEMIAN OAT NOTE AND BOND.

The "Bohemian oat note and bond," so called, are held to form the contract between the parties, and are construed together,

Digitized by Google

BOHEMIAN OAT NOTE AND BOND.—Continued.
as though written upon the same piece of paper, and as between the original parties, and those purchasing the note with notice of the bond, are held void. 455 (5).
See BILLS AND NOTES (3, 7).

BONA FIDE HOLDER—See BILLS AND NOTES (5, 6).

BOND—See REPLEVIN (1); SECURITY FOR COSTS.

BOOKS OF ACCOUNT.
1. Since the statute has made the parties to a suit competent witnesses, they can testify as well to the keeping of their accounts, and the correctness of their books, as to any other facts, and proof by third parties of their having settled according to such books, and that they were correctly kept, is not essential to their introduction in evidence. 98 (2).
2. In a suit to recover the price of merchandise claimed to have been sold to defendant, to whom the credit was given, and by his order delivered to a third party, whom he claimed was the real debtor, the plaintiff's books are competent evidence to show to whom the goods were charged, and the credit given. *Id.* (3).
3. A person is presumed to be cognizant of the contents of his books of account, but the probative force of such presumption may be strong or weak, as the circumstances may show that the party made the original entries, or that they were made by a clerk or book-keeper, and may be entirely overcome and disproved by the positive uncontradicted testimony of the party that the accounts were kept and entries made by such agents, and had never been examined by him, and that he had no knowledge thereof. 532 (7).

BURDEN OF PROOF—See BILLS AND NOTES (6); INFANT (1); MARRIED WOMAN (2).

CERTIORARI.
In the absence of a *specific* allegation in an affidavit for *certiorari* that no showing was made on oath as a basis for an application for an adjournment in justice's court, if the return shows that the adjournment was duly applied for upon showing made, the presumption is that the showing was legally made, and upon sufficient grounds. 84 (1).

CHARGE TO JURY.
1. A circuit judge has a right to presume that an ordinary jury

Digitized by Google

CHARGE TO JURY.—Continued.

has ordinary intelligence, and that the word "adverse," in *itself* means "hostile and distinct," when applied to qualify or define a possession of lands. 76 (2).

2. Where, under the testimony in a case, it is a disputed question whether, for a long time prior to the accident complained of, a bridge had been out of repair at the *place* where the accident occurred, it is proper for the court to direct the attention of the jury to the *precise place* in controversy, and to the disputed question whether *it* had been repaired. 134 (8)

3. In a suit by an attorney for professional services, the trial judge goes beyond his province in referring disparagingly to the plaintiff, or the value of his services. 201 (1).

See DAMAGES.

CHATTEL MORTGAGE.

A mortgage of all the lumber *now* on hand at a certain mill, and in transit, belonging to the mortgagors, being the lumber purchased of the mortgagees, is not constructive notice of a lien upon lumber shipped to the mortgagors by the mortgagees, and by them delivered to a third party, *after* the execution of the mortgage. 147 (2).

See EVIDENCE (12).

COLLATERAL ATTACK—See OFFICERS DE FACTO; RECEIVER.

COMMITTED—See WORDS AND PHRASES.

COMPROMISE—See CORPORATIONS (1, 2).

CONDEMNATION PROCEEDINGS.

1. The provisions of the charter of the city of Detroit authorizing the jury in condemnation cases to give a lumping verdict, deducting from the proper damages the enhanced value by benefits given to the owner's land *not* taken, and authorizing the city to determine in advance an assessment district, including the property which it may deem benefited, and providing that any compensation or damages shall be apportioned one-half against the city at large and one-half against the property benefited, are not sufficiently guarded, and as to a part at least are entirely without legal safeguards. 503 (1).

2. The Constitution does not allow property to be condemned unless there is a *public* necessity for it, and this must be a *real* necessity, without which private citizens cannot be disturbed in the enjoyment of their freeholds in their own way. *Id.* (2).

Digitized by Google

CONDEMNATION PROCEEDINGS.—Continued.

3. In estimating the necessity for taking private property for public purposes, it can make no difference to the public who owns the land. If it is necessary to take it, that necessity must be as great where it is owned *separately* as where it is part of a *larger* property; in which *latter* case the public have no right to force its sale for less than its *independent* value. *Id.* (3).

4. Every valid assessment must be based on some legally ordained basis of apportionment, and not arbitrarily. The charge, whether based on supposed benefits or any other legal burden, must be spread over the taxing district according to some uniformly applied rule, and in such a way as to show a compliance with that rule, whatever it may be. *Id.* (4).

5. There *may* be a necessity of leaving considerable discretion to the authorities who fix a taxing district, if it can be made to differ from the ordinary municipal subdivisions; but it cannot be such an *uncontrolled* discretion as to leave no public character whatever to the district, and make a purely *private* charge under pretense of setting off an assessment district. *Id.* (5).

6. It is elementary that no one can be lawfully made to bear more than his share of any public burden, and *that* share must be assessed by some tangible process of distribution. *Id.* (6).

7. The only theory on which the doctrine of charging the expense of public works on property benefited can be maintained is that if local improvements can be conveniently paid for by local assessments, in this way, in the long run, the general public may be charged for the general result with approximate equality. Any other theory of benefits involves the taking of private property for private use, and is unfair and unauthorized. The whole public, or the allotted district, or both, must pay for *all* that the public appropriates. 504 (7).

8. If one person is charged for more benefit than another, it must be because by the rule of apportionment his share is greater in the assessment; but he can only be obliged to pay his share, and must have the means furnished him by the proceedings of knowing *exactly* what his share is; and this cannot be done unless there is a *separate* finding of the value of the property taken and of the enhanced value of *all* the parcels of property within the district, so that the percentage of each owner can be

Digitized by Google

CONDEMNATION PROCEEDINGS.—Continued.

easily calculated, as in the case of any other tax or assessment. *Id.* (8).

9. There may be cases where the damage to property, by the establishment of a public way, includes *more* than the mere value of the land taken; but there can be no case where the price paid by the public can lawfully be any *less* than the value of the property taken. *Id.* (9).

See DRAIN LAW OF 1885 (2, 3); TOWNSHIP DRAIN COMMISSIONER (2).

CONFESSIONS—See CRIMINAL LAW (1).

CONFLICT OF LAWS.

The validity of an assignment of an insurance policy, issued by a foreign company, is to be determined by the laws of the state where made and attempted to be enforced. 117 (5).

See STATUTE OF FRAUDS.

CONSIDERATION.

1. The *true* consideration of a deed may always be shown where it becomes material to do so. 20 (1).

2. The relinquishment by a "homesteader" of his rights in land located under the homestead law is a good consideration for notes given to secure the payment of the price agreed to be paid for such interest. 182 (1).

See DAMAGES (7); PUBLIC POLICY (2).

CONSTITUTIONAL LAW.

1. The title to Act No. 313, Laws of 1887, namely, "An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving, or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented liquors, and vinous liquors, in this State," covers but one *general* subject-matter. 549 (1).

2. The attempted extension of powers to the board of metropolitan police of the city of Detroit by section 33 of Act No. 313, Laws of 1887, to *police* certain townships in Wayne county for the purpose of enforcing the provisions of said act therein, is illegal. 576 (1).

3. The proviso in section 2 of Act No. 222, Laws of 1885, directing the levy and collection of taxes to pay the amount due the several counties for interest on the so-called "Swamp

Digitized by Google

CONSTITUTIONAL LAW.—Continued.

land Fund," is not covered by the title to the act, and is void. 659 (2).

See CONDEMNATION PROCEEDINGS (2).

CONSTRUCTION OF CONTRACT.

1. The only object in construing a contract is to arrive at the intention of the parties. 61 (1).
2. What the parties to a deed did immediately after its execution affords a safe criterion of their intention and of the meaning of the language used in the conveyance. *Id.* (2).
3. A cardinal axiom in the construction of a written contract is that all of its parts must be examined, and effect given to every word and phrase, if practicable. 101 (1).
4. The language used, if unambiguous, must be held to express the intention of the parties. *Id.* (2).
5. It is only where the language employed is not free from doubt or uncertainty that resort may be had to the condition of the parties, the subject-matter of the contract, and the circumstances surrounding the transaction and connected therewith, to aid the court in arriving at the intention. *Id.* (3).
6. The written contract relied upon in this case reads as follows: "We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at the same price that Mr. Rheam has his for, and the binder is to do good work and give satisfaction; and, if not, the said Ellis is to pay for use of same."

   Held, that the agreement that the binder was to do good work and give satisfaction embraced independent conditions, and unless the binder gave satisfaction to Mr. Ellis, as well as doing good work, he was not obliged to keep and pay for the machine.

   Held, further, that a proper construction of the contract clearly brings it within the first class of such contracts referred to in the case of *Wood Reaping, etc., Co. v. Smith*, 50 Mich. 565, 569; and is governed by the decision in that case. *Id.* (4).
7. Several instruments made at the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together, for the purpose of showing the *true* contract between the parties. 451 (1).

See BILLS AND NOTES (3, 7); LEASE.

CONSTRUCTION OF STATUTES—See STATUTES (2, 4).

Digitized by Google

CONSTRUCTIVE NOTICE—See CHATTEL MORTGAGE.

CONSTRUCTIVE SERVICE—See ATTACHMENT SUIT (5).

CONTEMPORANEOUS AGREEMENT—See BILLS AND NOTES (3, 7); CONSTRUCTION OF CONTRACT (7).

CONTEMPT PROCEEDINGS— See DIVORCE (3).

CONTRACT—See CONSTRUCTION OF CONTRACT; HOMESTEAD; PUBLIC POLICY; SALE.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.

CONVERSION.

The owner of personal property who has contracted for its sale, but has not parted with his title or right of possession, cannot be guilty of its *unlawful* conversion. 188 (4).

See TENANTS IN COMMON.

CONVICTION—See SYNONYMOUS TERMS.

COVENANT OF WARRANTY—See DAMAGES (7); NOTICE TO DEFEND.

CORPORATIONS.

1. Corporate authorities, and generally the directors, have power to compromise any corporate debt, and if, in the collection of subscriptions, there is any doubt as to the liability of a subscriber, the corporation may compromise the liability, and release a part for the purpose of securing the residue. 249 (1).
2. A compromise made in good faith by the directors of a corporation with a stockholder, by which he is released from one-half of his subscription on payment of the residue, while subject to the rights of creditors, is binding upon the stockholders of a new corporation organized by those of the one first named, who exchanged their stock for an equal amount of that of the new company, said subscriber making his subscription on the basis of said compromise, of which fact the other stockholders had full notice. *Id.* (2).
3. A corporate note given for an *individual* obligation is not given in the usual course of business, and is presumptively *ultra vires*. Special authority would be required, and persons taking such note must ascertain at their peril that such authority has been conferred. 620 (1).
4. The fact that the manager of a corporation was accustomed to make and discount its notes to raise money to meet its expenses has no tendency to prove his authority to accept

Digitized by Google

CORPORATIONS.—Continued.

accommodation drafts drawn upon it by another corporation in which the drawee had no interest; nor can it be held liable on such acceptances by reason of the entry upon its books, by the direction of said manager, of an account of such acceptances, without the direction or knowledge of its officers. *Id.* (2).

COSTS.

Where the court refused to order the stenographer of the Kent circuit to file a copy of the testimony in a case pursuant to How. Stat. § 6515, and the counsel for the appellant procured the necessary portions to settle a bill of exceptions, which were also used by the opposing counsel in preparing amendments, and before the circuit judge on such settlement, who certified to the necessity of such use, the expense of procuring such testimony is properly taxable as a part of the appellant's disbursements. 115.

See SECURITY FOR COSTS.

CRIMINAL LAW.

1. The admissions or declarations of an accused party, when voluntarily made, are *competent* evidence against him; but the statements of another are purely hearsay, unless made under such circumstances, in the presence and hearing of the accused, that his acquiescence in such statements can be plainly inferred from his demeanor or conduct. 468 (2).

2. It is error to allow a prosecuting attorney to comment unfavorably to the jury upon the failure of the respondent to swear a witness whose alleged statements, as sworn to by a witness for the people, were *improperly* received in evidence. *Id.* (3).

3. In a criminal case it is presumed that *all* of the evidence relating to the subject-matter of the exceptions is in the record; and the Court is bound by the record as presented, and cannot go outside of it to guess that there was *other* evidence given on the trial, qualifying the testimony contained in the bill of exceptions. *Id.* (4).

4. If the jury are satisfied that a witness has testified truthfully in any portion of his testimony, they are permitted to receive and act upon it, although satisfied that other portions are false, or that he has spoken differently out of court, and has a bad reputation for veracity among his neighbors. Such testimony is to be regarded with suspicion, and closely scanned.

Digitized by Google

CRIMINAL LAW.—Continued.

and considered; but, if believed by the jury to be true, it is entitled to the same weight as if coming from any other source. *Id.* (5).

5. The return of a justice of the peace to an appeal in a criminal case, that the respondent was present when the verdict was rendered, is conclusive. 477 (1).
6. An adjournment of the trial of a criminal case for more than one week, on the application of the respondent, and by consent of the prosecuting attorney, will not oust the justice of jurisdiction. *Id.* (2).
7. An allegation in an information that a warrant "was issued by a justice of the peace," is not tantamount to averring that "it was issued by lawful authority." 480 (1).
8. The arrest of a person for a misdemeanor, after the commission of the act, cannot be made without a proper warrant. *Id.* (2).
9. In cases of misdemeanors, the sheriff must be present either in sight or hearing (with the warrant), directing the arrest, to justify a person *not* so armed to make the arrest. *Id.* (3).
10. A building, the upper part of which is used in the day-time as medical and other offices, and at night by *one* occupant, a single man, who sleeps in a furnished room in the basement, which is his only abiding place, is protected by the statute punishing stealing from a dwelling-house in the day-time. 491.
11. Under an information for larceny which alleges *two* prior *convictions* of the respondent for the same offense, but only *one sentence*, he cannot be sentenced as for a *third* offense under How. Stat. § 9425, nor can such sentence be held good for the excess over five years, under How. Stat. § 9141 or 9424, but will be affirmed for *five* years. 496 (2).
12. All doubts must be solved in favor of the accused, and it must appear from the record what *exact* offense was intended to be punished, and there should be no reasonable doubt for what crime the respondent is sentenced. *Id.* (3).
13. Where it appears from the record that a respondent was assigned counsel of his own choice, with whom he consulted before entering a plea of guilty, and that the circuit judge had a private examination of the accused before sentence, it must be presumed that he was satisfied in such interview that the plea was "made freely, with full knowledge of the

Digitized by Google

CRIMINAL LAW.—Continued.

nature of the accusation, and without undue influence." *Id.* (4).

14. The judgment in this case is affirmed, on the ground that the plea in bar sets forth that the cause was dismissed, and the jury discharged by the court upon the respondent's motion. 648 (1).

15. When a respondent is discharged by his consent, express or implied, a subsequent plea in bar must set forth the *cause* of such discharge, in order that the court may be advised whether it was by the consent of the respondent or not, and for such *reasons* and under such *circumstances* as will amount to an acquittal. *Id.* (2).

16. A debtor may resist, in a reasonable manner, a levy by an officer upon exempt property. 655.

DAM—See NUISANCE.

DAMAGES.

1. In a suit by a tenant, who had leased a farm "on shares," for an unlawful ouster and the conversion of the crops by the landlord, an instruction to the jury that, if they found for the plaintiff, he would be entitled to recover the value of the crop harvested, and the amount it had depreciated, if any, through defendant's negligence, less the value of defendant's labor in caring for and harvesting the same and his interest therein under the lease, is unobjectionable. 33 (3).

2. An instruction to a jury, in a suit for damages for an alleged wrongful discharge from employment, that the plaintiff is bound to use diligence in seeking other work, and performing it if found, in which case it should be deducted from or set off against his claim for damages, sufficiently covers a request for an instruction that if the plaintiff obtained such employment, which he voluntarily relinquished, he can only recover for the time subsequent to securing the same the *difference* between the two contract rates. 238 (2).

3. In a suit by a mill-owner for the non-delivery of logs under a contract for their manufacture, the measure of damages is the difference between the cost of manufacture and the contract price. 312 (1).

4. Where a claim is made for damages arising from a breach of contract, and evidence is offered to show loss of profits which might have been realized from its performance, the question to

Digitized by Google

DAMAGES.—Continued.

be determined is whether the damages claimed are too conjectural, speculative, or contingent to form a safe basis for estimating the damages. *Id.* (2).

5. Where a contract is executory, and the time for its performance has expired, and the elements out of which the profits were to arise can be ascertained and proved with reasonable certainty, and especially where the compensation is fixed by the contract, there is no reason why the difference between the cost of performance and compensation agreed upon should not be recovered as *actual* damages suffered by the aggrieved party by its violation, whether they be called gains prevented or loss of profits. *Id.* (3).

6. Under a declaration claiming damages for the interruption of a lumbering business by a wrongful possession of a saw-mill, if anything is recoverable, it is damages for breaking up or interrupting an *active* business, and *rental value*, if allowable at all, can only be considered in determining the amount of damages as a *possible* element, but not as *actual* damages. 344 (2).

7. The consideration to be recovered in an action for breach of covenant of warranty is the sum *received* by the defendant for the land. 612 (4).

See CONDEMNATION PROCEEDINGS (9); EVIDENCE (2, 3).

DEED.

The *true* consideration of a deed may always be shown where it becomes material to do so. 20 (1).

See TRUSTS.

DELIVERY—See SALE (4).

DESCRIPTION—See REPLEVIN (2).

DEFINITIONS.

Adverse. 76 (2).

Committed. 330 (1).

Discharged. *Id.*

DISCHARGED—See WORDS AND PHRASES.

DISCHARGE OF MORTGAGE—See MORTGAGE (2–5).

DIVORCE.

1. An order allowing complainant $8 per week as temporary alimony is held a reasonable one. 492 (1).

2. The possession by a wife of non-productive property, or prop-

Digitized by Google

DIVORCE.—Continued.

erty not available in her hands to obtain the necessary means to prosecute a suit for divorce, will not prevent the allowance of temporary alimony. *Id.* (2).

3. Where a husband informs his wife that he will not pay temporary alimony awarded her by the court, a formal demand on her part is unnecessary to lay the foundation for contempt proceedings. *Id.* (3).

DONATION NOTE—See RAILROAD AID NOTE.

DRAIN LAW OF 1885.

1. In construing Act No. 227, Laws of 1885 (drain law), the following points are decided:

a—The petitioners are not required to be *residents*, but only *freeholders*, of the township.

b—The *course* of the drain may be described by its *center* line, on each side of which its width, and land in addition upon which to deposit the excavation, is described in the record of the survey, which description is sufficiently certain.

c—The petition need not contain an accurate description of the *termini* and *route* of the proposed drain, which are to be approximately described for the information of the drain commissioner, who is to ascertain and determine the *practical* route and *termini* by the survey authorized by the act.

d—After receiving the petition, the first duty of the commissioner is to personally examine the route of the proposed drain, and determine whether it is necessary and conducive to the public health that the application should be granted; and, if so, he is to cause a survey to be made, and, if he finds from such survey the drain to be practicable, he is to make his order of determination, in writing, in accordance therewith, and procure a release of the right of way and of damages from all those who are willing voluntarily to give it. Up to this point his proceedings are *ex parte*. 625 (1).

2. The application for the appointment of commissioners to condemn land for the purposes of a drain, under section 5, chap. 3, of the drain law of 1885, must describe the land of *each* owner proposed to be taken with as much certainty as is necessary in a deed of conveyance of bargain and sale, and should contain such *data* that the *precise* location of each parcel of land may be found by the commissioners, and its area computed. *Id.* (3).

Digitized by Google

DRAIN LAW OF 1885.—Continued.

3. Where commissioners appointed by the judge of probate to condemn land under the drain law of 1885 are found to be interested or otherwise disqualified, the order of appointment may be vacated and a new citation issued, the statute not providing for filling such vacancies, but requiring the judge to proceed *de novo*. *Id.* (4).

DRAIN LAWS.

Drain laws which take from the citizen his private property against his will, can be upheld *solely* upon the ground that such drains are necessary for the public health. 625 (2).

See DRAIN LAW OF 1885; EQUITY (3); TOWNSHIP DRAIN COMMISSIONER.

DURESS—See TAXES (6).

EJECTMENT.

1. In an action of ejectment, title by adverse possession may be shown by the defendant under a plea of the general issue. 76 (1).
2. An equitable title cannot be set up against the legal title in an action of ejectment. 153 (3).

See TAXES (1).

EMANCIPATION—See INFANT (3).

ENTRY—See LAND CONTRACT (3).

EQUITABLE TITLE—See EJECTMENT (2).

EQUITY.

1. Equity will consider an incumbrance in force if the ends of justice can thereby be obtained. 36 (1).
2. The title of a daughter to land donated to her by her father by *parol*, of which she took immediate possession and held adversely for more than 20 years, making improvements upon the premises and claiming the same as her own, will be protected in equity as against his subsequent grantees and execution creditors, but *not* as against a subsequent mortgage given by him, of which she had full knowledge, as also of its foreclosure and the sale of the land thereunder, and entered into negotiations for its redemption therefrom, and made no claim to the mortgagees of the invalidity of their security as against her occupancy or title. 212.
3. A bill by land-owners who have valuable rights in a drain of several years' standing, and which affords a sufficient water

Digitized by Google

EQUITY.—Continued.

escape for their lands and those of adjacent proprietors, as well as the public highways it crosses, alleging that the drain commissioner is about to lay out and contract for the construction of a drain on substantially the same route as the old one, and communicating with it at both ends, and that it will in no way benefit the complainants, who will be assessed for its construction, and charging further that the defendant has lands which will be benefited by the new drain, and that he fraudulently procured a petition to be presented to him for its construction, makes out a case of equity which should be heard on the facts. 270 (2).

See RAILROAD COMPANIES; STATUTE OF LIMITATIONS (1, 4, 5).

EQUITY JURISDICTION.

It has never been held that a complainant not under guardianship may not file a bill, by solicitor and counsel, for relief, and courts of equity, instead of dismissing such bills, usually take some pains to see that the rights of a weak-minded party shall not be sacrificed. 332 (1).

See BILL TO QUIET TITLE.

EQUITY PLEADING.

1. The legal and equitable owners of a judgment may join in a bill to protect a levy made upon real estate under an execution issued on said judgment; and an objection to such joinder, if available, should be raised by demurrer. 158 (1).
2. Where the purpose, objects, and parties in two equity suits are different, the pendency of one cannot be pleaded in bar of the other. *Id.* (2).

EQUITY PRACTICE.

1. Our practice does not permit a separate hearing on a demurrer clause in an answer to a bill in chancery, and it ought not to be granted. 270 (1).
2. Where a bill is filed for the *discharge* of a mortgage on the ground of a *tender* of the amount due, which tender is found to have been insufficient, the bill may be retained as a bill to redeem under the general prayer for relief, the complainant offering in his bill to pay whatever may be found due the defendant. 437 (2).

See PARTIES.

ERROR WITHOUT PREJUDICE.

Where, after the testimony of a witness that a bridge, claimed

Digitized by Google

ERROR WITHOUT PREJUDICE.—Continued.

to be out of repair, was to his *personal* knowledge in good repair, was stricken out as incompetent, he was permitted to state fully its condition, from which it appeared, if he was believed, that the bridge *was* in good repair, the rejection of his first statement is error without prejudice. 134 (β).

ESTATES OF DECEASED PERSONS.

1. The liability created by the statute for negligence resulting in the death of the injured party is a chose in action and assets belonging to the personal representative; and if the executor refuses to enforce collection, and secures his discharge, the probate court may appoint a successor to complete the administration of the estate, under How. Stat. § 5943. 134 (9).
2. The judgment entry in the circuit court, on an appeal from the decision of commissioners on claims against the estate of a deceased person, should be an allowance or disallowance of the claim, which should be certified to the probate court. 185 (1).
3. The title of the testator's personal property vests in the executor for the purposes of administering the estate, and, if he neglects his duty in collecting and obtaining possession of the assets, the law affords the devisees and legatees a remedy, but it will not permit them to represent the estate in the prosecution or defense of suits. 297 (1).

See EVIDENCE (13–15, 18); PALMS WILL CASE.

ESTOPPEL.

1. A maker who says to a proposed purchaser of his note that it is all right, and that he will pay it at maturity, is estopped, after its purchase in reliance upon such statements, from asserting a failure of consideration, or pleading any other invalidity against the note. 303 (*b*).
2. While parties may sometimes be bound by what binds their *assignors* in privity, there is no rule which binds any one by *estoppel* by the acts and doings of his subsequent grantees. 344 (4).

See ACQUIESCENCE; BILLS AND NOTES (4).

EVICTION—See DAMAGES (1).

EVIDENCE.

1. A written contract purporting to embody the terms of a settlement by the parties of "*all* matters of difference between them, of whatever name or nature," and *unambiguous* and

Digitized by Google

EVIDENCE.—Continued.

complete in itself, not attacked for *fraud* or *mistake*, and which has been fully performed, cannot be varied by parol testimony. 28.

2. In a suit to recover the value of hay lost through the negligent flooding of plaintiff's land, evidence of the amount cut during the preceding year is admissible to show the capacity of the land for producing hay. 48 (4).

3. The destruction of plaintiff's pasturage by the negligent flooding of his land is *prima facie* evidence of damage to the amount of its value. 49 (5).

4. A plaintiff has the right to offer proof of such of several claims as he chooses, or none as to some items. 80 (1).

5. A party owning chattel property or choses in action is presumed to know it, and may testify to such *fact*, and the means of his knowledge can be disclosed upon cross-examination, if the defendant so desires. *Id.* (4).

6. The *joint* ownership of a negotiable promissory note, indorsed in blank and put in evidence without objection, may be shown by evidence of its purchase of the payee by the plaintiffs. *Id.* (5).

7. Parol evidence is admissible of the contents of a *lost* execution, and of a levy and sale thereunder, and of the return of the officer making the same. *Id.* (6).

8. Where an insurance company filed a bill of interpleader against a bank claiming as assignee of a policy under an assignment executed by the assured and his wife, and against the widow, who claimed under a prior assignment from her husband, and who denied the validity of the assignment to the bank, and the answer of the bank was silent as to the *fact* of such *prior* assignment, which was alleged in the bill, such assignment is sufficiently proved by the testimony of the widow to its execution and delivery, with the policy, and to its subsequent loss and search therefor, and by the introduction of an alleged copy, sworn by her to be genuine. 116 (3).

9. In a suit involving the condition of a bridge at time of an accident alleged to have happened by reason of its non-repair, testimony by one witness that "it was a very poor, shackly bridge," and by another that "from his personal knowledge the bridge was in good repair," is admissible. 134 (5).

10. In a suit for services testified to have been rendered by plaintiff a year after the date of a receipt for the payment for

Digitized by Google

EVIDENCE.—Continued.

a specific service rendered, the jury are not authorized to consider such receipt as covering the later account. 201 (3).

11. In a suit by a traveling salesman to recover damages for the wrongful refusal of the company to furnish him employment for a fixed period and at a stated salary, testimony of what other agents of the company had done at other times, and under other circumstances, is immaterial. 238 (1).

12. In replevin for chattel-mortgaged property, the mortgagor is not estopped from testifying to its sale, prior to the filing of the mortgage, to third parties, to whom he gave no information of said mortgage lien, it being desirable, if such vendees were innocent purchasers, to show that fact and avoid litigation. 246 (2).

13. The knowledge by third parties of facts which a plaintiff is disqualified from testifying to because equally within the knowledge of a deceased person will not remove the statutory bar to such testimony. 258 (1).

14. A change in the issue by the amendment of the declaration, after the revivor of a suit, will prevent the plaintiff's testifying to matters equally within the knowledge of the deceased defendant, under a claim that on a former trial both parties were witnesses, and that the former testimony of the defendant could be used as rebutting testimony by the administrator, if under *any* circumstances such a course is permissible. *Id.* (2).

15. In a suit by the holder of a note purporting to be indorsed *in blank* by a deceased payee, the fact that a *devisee* of the payee urges the defendant to defend on the ground that the indorsement is a forgery, and indemnifies him against loss in so doing, will not disqualify the plaintiff as a witness in his own behalf, Act No. 139, Laws of 1885, not being applicable to such a case. 293 (1).

16. In a suit by an indorsee involving the alleged forged indorsement of a promissory note, claimed to have been secured after its purchase, the plaintiff cannot testify who told him to procure such indorsement, nor can it be shown on his cross-examination that the indorser had money to loan at the time of his death, and that plaintiff filed a claim against his estate; but he can be asked if he had the pocket-book of the deceased after his death, he having testified on his direct examination that the note was kept in said book, and the defense claiming

Digitized by Google

EVIDENCE — Continued.

that he purloined it therefrom on the day the indorser died. *Id.* (2).

17. While an instruction to a jury that they are under no obligation to believe *any* of the testimony of a witness who swears falsely as to *one* material fact is technically correct, it is safer to further instruct them, in the same connection, that the credibility of *such* a witness is exclusively a question for them, and that there is no rule of law which prevents their giving him credit as to such portions of his testimony as they believe to be true and credible. *Id.* (3).

18. In a suit against the maker by the holder of a promissory note purporting to be indorsed *in blank* by a *deceased* payee, which indorsement is claimed to be a *forgery*, if the executor indemnifies the defendant, or takes upon himself the defense of the suit, the plaintiff will be disqualified from testifying to matters equally within the knowledge of the deceased payee. 297 (2).

19. In a suit by the purchaser of a promissory note before maturity, but with knowledge that its *real* consideration was the agreement of a so-called Bohemian oat association to sell $800 worth of oats for the maker before calling for payment of the note, testimony that the maker, after giving the note, took the initiatory steps towards joining another association of the same kind, can have no possible bearing upon the issue, and should be rejected. 303 (1).

20. Where the maker of a promissory note, in a suit by an alleged innocent holder, sought to avoid payment on the ground that the note was fraudulently obtained, and gave evidence upon his direct examination of the circumstances of the transaction, and was cross-examined upon the facts occurring at the time the note and an accompanying bond were given, he may be further asked to *specifically* point out the *circumstances* or *facts* which constituted the alleged fraud, such inquiry not calling for the *opinion* of the witness upon the *facts*, but for a statement of *what* facts operated upon his mind and produced the fraud complained of. 389 (1).

21. Collateral inquiries into the reputation and business of persons not parties to a suit are not desirable or permissible. *Id.* (2).

22. Where, in a suit upon a promissory note by an alleged innocent holder, the defendant claimed that the *purchase of that*

Digitized by Google

EVIDENCE.—Continued.

and other notes of *like* character *was in itself* a badge of fraud and part of a scheme to defraud the community *generally*, the plaintiff may show that there was no talk or thought of fraud abroad in the community at the time the notes were bought, and that the enterprise or scheme seemed only fraught with good results to all who participated in it. *Id.* (3).

23. In a suit against *two* defendants to recover money alleged to have been obtained of plaintiff upon a worthless mortgage executed by a *third* party, it is competent for the plaintiff to testify to statements made to him by *one* of the defendants *after* the mortgage was given, indorsing said security, as tending to show his concert of action with his co-defendant, who was *active* in procuring the money. 401 (3).

24. In a suit for the recovery of money loaned to *third* parties on the representations of the defendants that the title to the land was *perfect*, evidence of its occupancy at the time by claimants of the *original* title is competent to show the falsity of such representations. *Id.* (4).

25. In actions involving alleged fraud, when the knowledge and intent of the defendant is a material fact, evidence may be received of similar acts which happened shortly before or after, and which had no direct or apparent connection with the principal transaction; and where the question is whether a purchaser of goods procured them through fraud, distinct purchases made by him under similar circumstances, at or about the same time, and when the like motive may be reasonably supposed to have operated, are admissible in evidence with a view to the *quo animo*. 402 (5).

26. The exercise or non-exercise by a party of an option reserved in a written agreement to waive a condition favorable to himself, may be shown by *parol* as well as by *written* evidence. 463 (2).

27. The dealings of an insolvent debtor, in property, with his relatives, have no necessary connection with frandulent transactions; such relationship being a circumstance calling for closer scrutiny of such dealings, and may always be shown in evidence for that purpose. 542 (2).

28. Great inadequacy of price is important evidence to show fraud in the conveyance of property by an insolvent debtor, varying, however, with the circumstances of each case. *Id.* (3).

Digitized by Google

EVIDENCE.—Continued.

29. The circumstances should be such as to amount to clear proof before a party can be held liable for fraud; and the inferences to be drawn therefrom must not only be consistent with the fraudulent acts charged, but inconsistent with the theory of honesty and good faith in the transaction. *Id.* (4).

30. Where a grantor traded the land conveyed to a *third* party for *other* property, who traded it to the grantee for property the value of which was fixed at $800, which sum was named as the consideration in the deed, which by an agreement between the *three* parties, was executed *direct* to such grantee, in the absence of any agreement fixing the value of the property received by the grantor he may show its value, which will form the *real* consideration, but, if such value was agreed upon at the time of the execution of the deed, it will be taken as the real value. 612 (5).

31. In a suit for breach of covenant of warranty the recital in the deed of the consideration received is not *conclusive*, but the defendant may show that in *fact* he received a *less* sum. *Id.* (4).

See BOOKS OF ACCOUNT; CONSIDERATION; CORPORATIONS (4); CRIMINAL LAW (1, 3, 4); EJECTMENT; INFANT; IN STATU QUO; LOGS AND LOGGING (1); MALICIOUS PROSECUTION (5); MORTGAGE (3); VARIANCE; WAIVER (1, 3, 4).

EXECUTION.

A delay of two months in levying an execution, after legally issuable, will not release an attachment levy. 153 (2).

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEASED PERSONS.

EXEMPTION.

There is no law in this State which permits a sheriff or other officer under any writ to take from a debtor his only team, wagon, and harness, worth less than $250, while engaged in the business of farming, and the debtor is not obliged to submit to such trespass without *reasonable* resistance. 655.

FEES.

Charges by a sheriff for taking a prisoner to court and returning him to jail do not fall within the statute allowing a fee of 35 cents for every person committed to and discharged from jail. 330 (2).

Digitized by Google

FINDINGS OF FACT.

The findings of fact made by the trial judge cannot be disturbed if there was any evidence to support them. 98 (1).

FORECLOSURE—See STATUTORY FORECLOSURE.

FRAUD.

1. Under the evidence in this case, defendant's testator, Hewitt, is held not to have been guilty of any fraud in obtaining the title and possession of the lumber in suit. 147 (4).
2. Without attempting to measure the exact boundaries in the record between actual and constructive fraud, we think none of the transactions relied upon by the defendants, whether connected with the deed or the alleged settlement, were the legal acts of the complainant; which deed is set aside and declared null and void. 332 (3).

See EVIDENCE (20, 22, 25, 27–29).

FRAUDULENT CONVEYANCES.

"Unless the creditor has a *certain* claim upon the property of the debtor, he has no concern with his frauds." 542 (5).

GENERAL ISSUE—See EJECTMENT (1).

GIFT.

1. A gift resting merely in intention, even though accompanied by a promise, could not be enforced against an individual, and is still less binding on the public. 659 (*c*).
2. There can be no question of the right to recall any merely proposed gift so long as it remains in the hands of the giver. *Id.* (*d*).

GRANT.

The law presumes the acceptance of a beneficial grant by the grantee. 220 (3).

GUARDIAN AND WARD.

1. A petition under How. Stat. § 6314, for the appointment of a guardian for an alleged incompetent person, must contain a statement of facts authorizing the appointment, and must show upon its face that it is made by some one of the persons named in the statute, and also inform the court *who* will be affected by such appointment, which will manifestly include the presumptive heirs at law and distributees. 348 (1).
2. A petition which states that it is necessary that a guardian of the person and estate of the alleged incompetent person be appointed, because he is mentally incompetent to have the care

Digitized by Google

GUARDIAN AND WARD.—Continued.

and management of his property, raises an issue to be determined by the probate judge, and is not open to the objections discussed *In re Brown*, 45 Mich. 326, and *In re Storick*, 64 Id. 685. *Id.* (2).

3. An order by a judge of probate appointing a guardian for an incompetent person must cover both the *person* and *estate* of the ward. *Id.* (3).
4. A decree by the probate court adjudging an alleged incompetent person to be mentally incompetent to take care of himself and manage his property is essential, and such adjudication should appear of record. 349 (4).
5. The proceeding to appoint a *special* guardian for an incompetent person is purely ancillary to the appointment of a *general* guardian, and if the *latter* appointment is illegal the *other* falls with it. *Id.* (5).

HIGHWAYS.

1. In proceedings for laying out or discontinuing highways, the record must show *affirmatively* that the requirements of the statute have been complied with, and the *jurisdiction* of the commissioner. 17 (1).
2. When the hearing of an application for the discontinuance of a highway was adjourned by the commissioner for *twenty* days, no action can be legally taken until the *adjourned* day. *Id.* (2).
3. Ten *full* days' notice must be given of the hearing of an application to discontinue a highway. *Id.* (3).
4. Where a township-line road has been allotted, under the statute, between two townships, *each* becomes liable to keep *its* portion in repair, and *neither* township can legally obligate itself to aid in the erection of a bridge forming a part of that portion of said highway allotted to the other township. 441 (1).

See TAXES (3).

HOMESTEAD.

1. Where the owner of two city lots supposed she had erected her dwelling-house upon one of them, as did all parties interested, but the building was found to encroach a few inches upon the other lot, which was sold on an execution against her, her homestead rights will be protected, and to that end the *supposed* division line will be treated as the *true* one. 153 (4).

Digitized by Google

HOMESTEAD.—Continued.

2. Where the owner of two city lots forming one enclosure, with no visible line of separation, erected a dwelling-house upon both lots, which she occupied as her homestead, and the entire premises did not exceed in value the sum of $1,500, and were used and occupied as one lot, such homestead must be held as embracing both of the so-called lots. *Id.* (5).
3. An averment in a bill of complaint that complainants are living upon 40 acres of land, *which is their homestead*, necessarily implies that the land does not exceed in value $1,500. 602 (1).
4. A contract giving a railroad company the right of way over land occupied as a homestead is void, as against such homestead, without the signature of the wife. *Id.* (2).

See RAILROAD COMPANIES.

INADEQUACY OF PRICE—See EVIDENCE (28).

INCOMPETENT PERSON—See GUARDIAN AND WARD.

INFANT.

1. In a suit on a note given by a minor, the burden of proof is on the plaintiff to show ratification after defendant attained his majority. 185 (2).
2. The mere *silence* of a minor for two years after arriving at full age raises no presumption of his ratification of a note given during his minority, but there must be an *express* promise after he became of age, or *acts* equivalent to a *new* contract. *Id.* (3).
3. The question of the emancipation of a minor at the time he executed a note is irrelevant to the issue in a suit on the note, as it could not affect his liability thereon. *Id.* (4).

See LIQUOR TRAFFIC (3); NEGLIGENCE (1–4).

INFORMATION—See CRIMINAL LAW (7, 11, 12).

INJUNCTION—See RAILROAD COMPANIES.

IN STATU QUO.

The note of a *third* person, which may be needed as evidence in a suit to recover money alleged to have been fraudulently obtained of the plaintiff, need not be surrendered to the *defendants* before bringing such suit. 401 (2).

INSURANCE.

Under How. Stat. §§ 4288, 6300, 6301, a wife may insure the life of her husband in her favor, with a provision that in case she

Digitized by Google

INSURANCE.—Continued.

dies first the insurance shall be paid to their children, or to their guardian if under age. 117 (4).

INTENTION—See CONSTRUCTION OF CONTRACT.

INTERPRETATION—See STATUTES (3).

JUDGMENT.

Where appeals were taken by one of two defendants from justice's judgments, and prosecuted by *him* to final judgment for costs in the circuit court, his co-defendant refusing to join in such appeals or bear a share of the expenses attending the same, a satisfaction of said judgment by said co-defendant, filed in the case, should be set aside. and such costs retaxed in favor of the active appellant, on his motion, it appearing that prior to such satisfaction he had turned the judgment over to his attorneys in payment of their fees. 242.

See ESTATES OF DECEASED PERSONS (2).

JURISDICTION.

The sum claimed in the *ad damnum* determines the jurisdiction of a justice of the peace in an action of *assumpsit*. 80 (2).

See ATTACHMENT SUIT (4).

JURY.

1. *Memoranda* or statements made by counsel should not be given to the jury, to be used by them in the jury-room, unless by consent of the attorney of the opposite party. The only exception to this rule exists in cases involving the investigation of long accounts, where numerous items are to be passed upon, when, if there are no bills of particulars, it might be proper, in the discretion of the trial judge, to allow the jury to take to the jury-room lists of the items claimed on *both* sides. 208 (1).

2. Where, in a suit for the value of stock killed by a railway company, testimony was received on *both* sides tending to show the value of the animals killed, and the damage to those injured, and the jury were permitted to take to the jury-room a statement made by the plaintiff's counsel showing the highest amounts given by any witness of such value and damage, and the jury rendered a verdict for *less* than the *average* of such amounts, with interest, the use by the jury of such statements was error without prejudice. *Id.* (2).

Digitized by Google

JURY.—Continued.

3. The case of *Millar v. Cuddy*, 43 Mich. 274, is qualified in so far as it conflicts with the doctrine laid down in head-note 1. *Id.* (3).

See CHARGE TO JURY.

JUSTICES OF THE PEACE.

The sum claimed in the *ad damnum* determines the jurisdiction of a justice of the peace in an action of *assumpsit*. 80 (2).

See ADJOURNMENT.

JUSTICE'S RETURN—See CERTIORARI; CRIMINAL LAW (5).

LACHES—See EXECUTION.

LAND CONTRACT.

1. A vendee in possession of land under a paid-up contract, and entitled to a deed, has a sufficient title to enable him to recover for hay and pasturage lost through the negligent flooding of the land by a booming company. 48 (2).
2. Under a clause in a land contract giving to the vendors one-half of the proceeds of the hay raised upon the land until the purchase price is paid, the vendee must account in *money* for the value of the share reserved, but the title to the property and right of possession remain in him. *Id.* (3).
3. A land contract giving, if fulfilled, an estate in *fee-simple*, can never expire by its own limitations except by forfeiture for breach of condition, and the vendor has no right of entry for any *other* reason. 514 (2).

See STATUTE OF LIMITATIONS (2).

LANDLORD AND TENANT—See DAMAGES (1); LEASE.

LEASE.

The fair construction of a lease for a term of one year from a given date, with the privilege of longer lease, if both parties are suited, for a term of eight years, reserving the right to sell part or all is that the lease should terminate upon a sale of the premises, or, if of a portion of them, as to the part sold. 87.

LEVY—See EXECUTION.

LIQUOR LAW OF 1887—See LIQUOR TRAFFIC (1, 2).

LIQUOR TRAFFIC.

1. The following provisions of the liquor law of 1887 are held unconstitutional:

Digitized by Google

LIQUOR TRAFFIC.—Continued.

a—Authorizing the approving board to reject a bond if the principal is known to them "to be a person whose character and habits would render him or her an unfit person to conduct the business of selling liquor."

b—Authorizing the county treasurer to require new bonds "in any [other] contingency that he shall determine requires it."

c—Allowing and directing various officers to close places of sale on their own determination of facts, and to arrest parties without process for a breach of the peace.

d—Providing for the forfeiture of business in addition to fine and imprisonment. 549 (2).

2. The new taxes and penalties not involving the peculiar disabilities named are valid, as well as the new method of prosecution in the upper instead of justice's courts, and, except as pointed out, the law may be enforced. *Id.* (3).

3. A majority of the Court hold that every sale of intoxicating liquor, where the *delivery* is to one *known* to be a minor, comes within the prohibition of the statute, and that no such liquor can be furnished where a minor is to receive it, whether intended for himself or not, without a violation of the statute, which in their view covers every dealing in which a minor has the liquor delivered to him. 487.

See CONSTITUTIONAL LAW (1, 2).

LOGS AND LOGGING.

1. Evidence that a booming company had possession of a river in which its men were running logs, which jammed below the land of a riparian owner, and that the company continued running logs against said jam until it extended and filled the river above said land, where it remained for about one month, is sufficient, if unexplained, to make out a *prima facie* case of negligence; and it is not necessary for the plaintiff to negative the exercise by the company of reasonable care and dispatch in its work, or to specify in what respect its employés were negligent. 48 (1).

2. A log-owner has the right to use a stream in its *natural* capacity to float his lumber or timber, and is not responsible for any damage incidentally and without his fault arising therefrom. But he has no right to deal with his logs in such a way, by the formation of jams or otherwise, as to cause the water to overflow the adjoining lands more than it would were the logs left

Digitized by Google

LOGS AND LOGGING.—Continued.
to themselves, and allowed to float down naturally and without artificial interference. 49 (6).
3. The Muskegon river has a well-defined channel or bed between well-defined banks or sides; and the low or bottom lands upon the sides of the stream, that are overflowed more or less in times of high water, are not within its boundaries; and the capacity of said stream cannot be increased by artificial means so as to permit the log-owner to use at all times the full volume of water that may flow therein during unusual and brief freshets. *Id.* (7).
4. The public right of navigation is measured by the capacity of the stream for valuable public use in its *natural* condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation. *Id.* (8).

LOSS OF PROFITS—See DAMAGES (3–5).

MALICIOUS PROSECUTION.
1. An action for malicious prosecution will lie without any arrest or seizure of property. 590 (1).
2. The settlement of the debt by a defendant in an attachment suit, and the payment of the costs of the proceedings, is *not* a bar to an action for malicious prosecution if the attachment was malicious and without probable cause. *Id.* (2).
3. The want of probable cause for suing out a writ of attachment in itself raises a presumption of malice under the law. *Id.* (4).
4. If the plaintiff *honestly* believes that there is probable cause for suing out a writ of attachment, the mere fact of its *non-existence* will not render him liable for malicious prosecution; and it is for the jury to determine if he entertained such belief, which fact they must determine by ascertaining what careful and prudent business men would have done under like circumstances. *Id.* (5).
5. In a suit for malicious prosecution in suing out a writ of attachment, evidence of the publication in a newspaper of a notice of such attachment, and of the circulation of the paper, is admissible as tending to show the publicity given to the act complained of; and the plaintiff may also show that his business reputation was good before the issuance of the writ. *Id.* (6).

Digitized by Google

MANDAMUS.

The repeated decisions of this Court show the impropriety of allowing a private relator by *mandamus* to litigate the title of his adversary to a public office, which impropriety is more marked where, in assailing that title, the appointing or electing power of two municipal corporations with rival claims would have to be discussed and decided collaterally. 323 (1).

MARRIED WOMAN.

1. The introduction in evidence of a promissory note signed by a married woman *jointly* with her husband, with proof of her signature, will not make a *prima facie* case against her. 116 (1).
2. In order to bind a married woman, the contract must be one on behalf of her sole property, and it should appear to have been made with that intent, as well as upon a consideration that would sustain it for that purpose; the burden of proof being on the plaintiff to show for what purpose she contracted, and to prove it clearly. *Id.* (2).

MINOR—See LIQUOR TRAFFIC (3).

MISJOINDER—See EQUITY PLEADING (1).

MORTGAGE.

1. It is an elementary rule that equity will consider an incumbrance in force if the ends of justice can thereby be obtained. 36 (1).
2. Where a mortgage has been discharged from the record through mistake, it may be restored in equity, and given its original priority as a lien, when the rights of innocent third parties will not be affected. *Id.* (2).
3. A discharge upon the record of a mortgage is not an absolute bar to a foreclosure, unless there has been actual satisfaction. The facts still may be investigated. Such discharge of record is evidence of a high character, and sufficient to sustain the rights of all persons interested, unless the person setting up the discharged mortgage shall show some accident, mistake, or fraud, and this must be shown satisfactorily, and, if not, the discharge is conclusive proof of payment in favor of third persons, who have a right to look to the record for protection. *Id.* (3).
4. Purchasers or incumbrancers who become such after the discharge of mortgage is placed upon record are entitled to the same protection which the recording laws afford to subsequent

Digitized by Google

MORTGAGE.—Continued.

purchasers and incumbrancers in good faith, as against unrecorded conveyances, who can be affected only by actual notice, or notice of such facts as should have put them upon inquiry. *Id.* (4).

5. When it is conceded that the discharge of a mortgage was placed upon record by mistake, and the testimony satisfactorily shows that the mortgage debt has not been paid, a purchaser of the premises covered by the mortgage, who is informed by the mortgagor that the mortgage is still outstanding and held by a person, naming him, is affected with notice that the discharge was recorded by mistake, and is not protected by an abstract showing the mortgage to have been discharged. 87 (5).

6. Where a purchaser of land takes the same subject to a mortgage held by a third party as security for the payment of a smaller debt due from the mortgagee, which he purchases from the assignee, and takes an assignment of the mortgage, with knowledge of the rights of the assignee therein, he will hold it in trust for the owner as to the balance due above the debt it was assigned to secure, for which balance the mortgage will remain a lien on the land. 230 (2).

See CHATTEL MORTGAGE; EQUITY PRACTICE (2); STATUTORY FORECLOSURE; SUBROGATION.

MUSKEGON RIVER—See LOGS AND LOGGING (3).

NAVIGATION—See LOGS AND LOGGING (2–4).

NEGLIGENCE.

1. The *right* of a child to cross a railroad track is accompanied with the duty to use *reasonable* and at least *ordinary* care in so doing, his age, experience, and intelligence being taken into consideration with the other circumstances existing at time of his injury; and if, after a proper consideration of *these* things, the jury shall find that the child had sufficient intelligence—and experience if that shall be found necessary—to know of the danger, of the signals and the warnings against it, and the manner in which an injury might be produced by a failure to observe such signals and warnings, they are warranted in considering the question of contributory negligence; and if they find that the accident occurred by reason of the failure of the child to observe such warnings and signals and indications of danger, and of his neglect of the duty thereby

Digitized by Google

NEGLIGENCE.—Continued.

imposed upon him to avoid the danger, and injury ensues, his negligence will be such as to prevent a recovery therefor. 90 (1).

2. *Ordinary care* has relation to the situation and condition of the parties, and varies according to the exigencies which require vigilance and attention, and, when contributory negligence is sought to be attributed to a child, he can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment. *Id.* (2).

3. In a suit for injuries to a child by a railroad train, where his contributory negligence is a question for the jury under the evidence, it is the province of the jury to judge of his capacity and ability, and the manner in which he used the same on the occasion when the accident occurred, and whether he was of sufficient age and judgment to have used them otherwise, so as to have avoided the calamity which overtook him. 91 (3).

4. Under the testimony in this case, the action of the court in leaving it for the jury to say whether or not the evidence satisfied them that the plaintiff had such judgment and comprehension as enabled him to appreciate the danger he incurred, and subject him to the consequences of negligence if he failed to use his reason and senses in seeking to avoid it, is sustained. *Id.* (4).

5. The only negligence which creates responsibility is that which has caused the mischief done, and there is always danger that redundant charges, if allowed to be proved, will not only confuse the *real* issues, but may, and generally do, lead to convictions not based on the *real* charge. 523 (1).

6. In this case the answers of the jury to the special questions submitted to them are held to *negative*, not only the *case* made by the declaration, but also any agency of defendants in plaintiff's going into the place of danger where he received the injuries complained of, and to have entitled defendants to judgment on such special findings. *Id.* (2).

See ESTATES OF DECEASED PERSONS (1).

NON-RESIDENT DEFENDANTS.

The policy of the statute in regard to non-residents requires that they shall have a speedy hearing, and if *actually* summoned they have no delay beyond four days to keep them from going to trial. 451 (3).

Digitized by Google

NOTICE—See BILLS AND NOTES (5, 7); CHATTEL MORTGAGE, HIGHWAYS (8); MORTGAGE (5).

NOTICE TO DEFEND.

A notice to a grantor that a suit has been commenced against the grantee by declaration, giving date of service, and attaching a copy of the declaration to such notice, and requesting the grantor to defend the suit under the covenants of warranty in his deed of the premises described in the declaration, giving the date of the deed, is a sufficient notice in writing of the pendency of such suit, and that the grantor is required by the grantee to defend it. 611 (2).

NUISANCE.

The unlawful flowing of land by the erection of a dam, and the consequent injury to the water-privileges of the land-owner, is a nuisance, which he has the right to abate by the removal of the dam. 64 (2).

OFFICERS DE FACTO.

The action of county drain commissioners, who assume to act as such, and are at least officers *de facto*, as far as it falls within the authority conferred upon such officers, is not open to collateral attack. 273 (2).

OWNERSHIP.

A party owning chattel property is presumed to know it, and may testify to such *fact*, and his *means* of knowledge can be disclosed on cross-examination, if the defendant so desires. 80 (4).

PALMS WILL CASE.

For the construction of this will, as far as determined by the decree of the appellate court, see *Palms v. Palms*, 355.

PAROL TESTIMONY—See EVIDENCE (1, 7).

PARTIES.

Where all of the parties who appear to be interested in undischarged mortgages claimed by the complainant, in a bill filed to secure their discharge, to have been paid and fraudulently kept alive, are before the court, the *possible* interest of others in the securities cannot be urged as a reason for denying the relief prayed for. 158 (3).

See EQUITY; EQUITY PLEADING (1); TRESPASS.

PARTITION.

After an acquiescence by the heirs for twenty years in a division

Digitized by Google

PARTITION.—Continued.
and partition of an estate, it is too late for one of them to disturb or impeach it. 106.

PARTNERSHIP.
1. For a case involving questions arising upon the dissolution of a partnership and an accounting between the parties, one of whom was obligated to convey the joint property to the other upon certain conditions, see *Johnson v. Fowler*, 1.
2. One partner cannot bring a separate action at law for his supposed share of a partnership grievance. 344 (3).

PARTNERSHIP ACCOUNTING.
Wingarden v. Verhage is a case of partnership accounting, and involves questions of fact *purely*. 14.

PAYMENT.
1. Payment is a matter of defense to be shown by the defendant in some way, when plaintiff has made out his case. 201 (2).
2. Renewal notes given in lieu of others, on which no payments were in fact made, cannot be treated as *payments* of the original notes. 246 (1).
3. The attempt to compel payment where there is no legal burden is regarded as a *legal* injury, and payment made to avoid the seizure and sale of property to pay the wrongful claim may be recovered back as an extorted sum for which there was no consideration. 263 (3).

See TAXES (5, 6).

PENALTY—See PLANK-ROAD COMPANIES.

PLANK-ROAD COMPANIES.
1. In a suit to recover the statutory penalty for forcibly passing a toll-gate without the payment of toll, evidence of an executory agreement between a city alderman and the directors of the toll road company to cease collecting toll on the portion of its road lying within the city limits, and to remove the gate in question, cannot be set up by the defendant as a defense. 265 (1).
2. The fact that a defendant thought a toll-gate which he forcibly passed was illegally maintained is no defense to a suit for the statutory penalty. *Id.* (2).

PLEADING.
1. A declaration not demurred to, and stating facts sufficient to warrant a recovery, and under which plaintiff made his case

Digitized by Google

PLEADING.—Continued.

without objection, will be held sufficient in the appellate court. 88 (1).

2. Title by adverse possession may be shown in an action of ejectment under the general issue. 76 (1).

3. The object of a pleading is to apprise the court and opposite party of the pleader's claim. Certainty to a *common* intent is all that is required in the declaration, and this is attained, in actions of trespass on the case for negligence, when the neglect of duty relied on, and resultant injury, are described with *substantial* accuracy. 133 (2).

4. Notice must be given of a proposed defense, in a suit on the promissory notes of the defendant, of misrepresentation and fraud in their procurement. 182 (1).

5. In a suit by a traveling salesman to recover damages for the alleged wrongful refusal of a company to furnish him employment for a fixed period and at a stated salary, according to a contract counted upon, to which declaration the defendant pleaded the general issue only, testimony on the part of the company of representations made by the plaintiff of the amount of goods he could sell is not within the pleadings, and therefore incompetent. 238 (1).

6. Where, in a suit to recover money which the plaintiff claims to have been induced to part with and lay out and expend by means of the fraudulent procurement of the defendants, the declaration properly counted upon *three* transactions as *one* deal from its commencement to the final ending, counts added by amendment separating the three transactions do not set forth a new cause of action. 401 (1).

7. Averring that a warrant "was issued by a justice of the peace," is not tantamount to alleging that "it was issued by lawful authority." 480 (1).

8. The declaration in this case is held to be a sufficient declaration in covenant, and specific enough in its allegations to admit the necessary proof to support the plaintiff's action. 611 (1).

See JURISDICTION; VARIANCE.

POSSESSION—See EJECTMENT (1).

PRACTICE IN CIRCUIT COURTS.

1. It is error for the trial court to limit the number of witnesses to be sworn by either party, upon a material and one of the main issues in the suit. 341.

Digitized by Google

PRACTICE IN CIRCUIT COURTS.—Continued.

2. Where, at the close of the trial of a suit for breach of covenant of warranty in a deed, the counsel for the defendant moved to strike out the evidence of the plaintiff relative to the service of notice on the defendant to defend the suit by which the plaintiff was evicted, on the ground that it was not set up in the declaration, and, in answer to a remark by the court that he did not understand him to question under his own evidence the *fact* of such service, repeated his former objection, and made no claim of *non-service* on the trial, nor asked to have the question submitted to the jury, the court did not err in not submitting the question of service to the jury. 611 (3).

See ESTATES OF DECEASED PERSONS (2); JURY.

PRACTICE IN SUPREME COURT.

1. Where no reason is stated for an objection to testimony, the appellate court cannot say that the trial court erred in overruling it. 134 (7).
2. Where the appellate court can arrive at no *decided* convictions from the testimony, which lead to a different conclusion than that reached by the court below, its decree will not be disturbed, especially where such testimony is taken in open court, when the circuit judge has an opportunity of seeing the witnesses and hearing them testify. 437 (1).
3. The record, as made in the court below, cannot be amended at the hearing upon a writ of error and bill of exceptions, but must be taken as settled by the circuit judge, unless some proceedings are taken before hearing to amend it. 468 (1).

See PLEADING (1).

PRINCIPAL AND AGENT.

1. A person who deals with an agent is bound to inquire into the *extent* of his authority, ignorance of *which* is no excuse. 531 (1).
2. The authority of an agent to collect money for his principal does not authorize him to receive anything but money in payment from the debtor. *Id.* (2).
3. The carelessness of the principal in reposing confidence in his agent does not make him liable to a third party who, in dealing with such agent, fails to exercise the diligence usual with good business men under the circumstances. *Id.* (3).
4. A party dealing with an agent who has *general* authority to sell goods or collect debts is bound to know that he has no

Digitized by Google

PRINCIPAL AND AGENT.—Continued.

authority by virtue of his agency to apply or offset his *private* debt to such *third* party in payment of the debt of the third party to the principal; and, if this is done, *he* takes upon himself the burden of showing an *express* authority in the agent, or ratification by the principal. *Id.* (4).

PROBABLE CAUSE—See MALICIOUS PROSECUTION (2–4).

PROFITS—See DAMAGES (3–5).

PROMISSORY NOTE—See BILLS AND NOTES.

PUBLIC HEALTH—See DRAIN LAWS.

PUBLIC POLICY.

1. If a contract is at war with the established interests of society, and in conflict with the morals of the time, the fact that individuals may suffer by holding it void on the ground of public policy cannot affect the question, as the interests of individuals must in many cases be subservient to the public welfare. 454 (3).
2. If any part of the consideration of a contract is *illegal*, the *entire* consideration is *void*, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. *Id.* (4).

PUBLIC WRONGS.

Public wrongs must, in this State, be redressed by the people's public agents, and not by private intervention. The case of *Miller v. Grandy*, 13 Mich. 540, laid down the Michigan doctrine on this subject, with its reasons, and has been adhered to. 291.

QUESTION OF LAW—See WAIVER (4).

QUESTIONS OF FACT—See WAIVER (1, 3).

QUESTIONS TO JURY—See NEGLIGENCE (6).

QUO WARRANTO.

For a valuable summary of propositions relating to this proceeding, see *Frey v. Michie*, 324.

RAILROAD AID NOTE.

The maker of a note given in aid of the construction of a railroad, the payment of which is conditioned upon the running of cars on the road by a certain date, becomes liable for such payment if the railroad company begins to run construction

Digitized by Google

RAILROAD AID NOTE.—Continued.

trains over the road by the date named, although the road is not ballasted nor in fit condition for use, and freight and passenger trains are not run thereon, until some months after said date. 111.

RAILROAD COMPANIES.

A railroad company claiming under a contract from a husband for a right of way over his homestead, not signed by the wife, of whose rights it will be presumed to be informed, by entering upon the land early in the morning of the Sabbath day, with a large force of men, and tearing down a barn upon the premises, without reference to what effect the elements might have upon its contents, makes an aggravated assault upon the rights of the wife, for which there can be no excuse, and courts will not hasten, because of a few technical defects in a bill filed to enjoin such trespass, to uphold such a course of proceeding, or to so rule as to open the way for further violence in that direction. 602 (3).

RATIFICATION.

1. A township cannot ratify a contract it could not legally enter into in the first instance. 441 (2).
2. There can be no ratification of the act of an agent without full knowledge of the *facts* which it is claimed are ratified 531 (5).
3. *Knowledge* on the part of a firm of coal dealers that a clerk had for more than seven years been in the habit of applying his rent and other claims due from him to his landlord on account of coal purchased of said firm by the landlord, during which time no objection was made by said firm, amounts to a ratification of such unauthorized course of dealing. *Id.* (6).
4. It is generally a question for the jury whether silence affords a reasonable presumption of ratification under the circumstances of the particular case, and it will depend very much upon the question whether the party dealing with the agent had reason, from the course of previous dealings, or from the circumstances of the case, including the fact that the principal had notice or knowledge of the assumed authority of the agent in the dealings, to suppose that the principal would inform the party if he intended not to ratify the act, and whether his delay and silence, after such notice or knowledge, are or are not a fraud upon the other party. 532 (8).

See INFANT (1, 2).

Digitized by Google

RECEIPT—See EVIDENCE (10).

RECEIVER.

The legality of the appointment of a receiver cannot be questioned in a *collateral* proceeding by defendants who have *fully* and *completely* recognized such officer as legally appointed. 424 (1).

RENTAL VALUE—See DAMAGES (6).

REQUESTS TO CHARGE.

1. The alleged refusal to give certain requests to charge, which the circuit judge certifies were not presented to him to his recollection, cannot be assigned as error. 134 (4).
2. Where, in a suit by an alleged *bona fide* holder for value of a promissory note transferred before maturity, the defendant relies upon distinct false representations made in obtaining said note, *each* of which is set forth in a request for an instruction to the jury that, if they find that *such* false representation was made, the plaintiff cannot recover unless shown to be a *bona fide* holder for value, it is error to refuse to give such *several* instructions, which is not cured by bunching the three propositions together so that the jury might believe that they must find *all* of the alleged misrepresentations to have been made in order to throw the burden of proof upon the plaintiff on this branch of the case. 390 (6).

REPLEVIN.

1. The failure of the sureties in a replevin bond to justify their pecuniary responsibility in writing indorsed on the bond is not a jurisdictional defect, the statute permitting a new bond to be filed where objection is seasonably made. 84 (3).
2. Where the plaintiffs in replevin were entitled, as mortgagees, to the possession of an *entire* stock of boots and shoes, a description of the property to be replevied as "sufficient of said stock [fully locating the same] to satisfy the claim of the plaintiffs, as mortgagees of said goods, amounting to $805," is sufficient. 204.

RESIDENCE.

A man's residence cannot be in one city, and his family occupy a homestead owned by him in another, where he visits them every two weeks and makes his home. 147 (3).

RESISTING AN OFFICER—See CRIMINAL LAW (16).

Digitized by Google

RES JUDICATA.

In this case the questions of *fact* submitted to the jury, and found in favor of the defendant, were passed upon in *Cook v. Rounds*, 60 Mich. 310, with a like result, and cannot now be held to have been improperly submitted to the jury. 514 (1).

RETURN—See CERTIORARI; CRIMINAL LAW (5).

RIGHT OF WAY—See HOMESTEAD (4).

RULES—See SECURITY FOR COSTS (1).

SALE.

1. On a sale of $3,000 worth of lumber out of any one of three grades, without further designation, marking, or setting apart, to be loaded on the cars as ordered, the title will not pass until the lumber is so loaded. 147 (1).
2. An agreement for the sale of a quantity of iron ore, for a *price* per ton dependent upon *that* received by the vendee on its sale, lacks an essential ingredient of a contract of sale, and cannot be enforced. 188 (1).
3. In order to pass the title to personal property under a contract of sale, the purchase price must be fixed, and, if credit is given, the time and terms of payment must be stated. *Id.* (2).
4. Under an agreement for the sale of a quantity of *lean* iron ore, to be delivered on the cars by the vendor after the worthless portion was removed, as sold by the vendee to third parties, the *title* will not pass until such delivery. *Id.* (3).

SATISFACTION OF JUDGMENT—See JUDGMENT.

SAWING CONTRACT—See DAMAGES (3–5).

SECURITY FOR COSTS.

1. Chancery rule No. 6, providing for security for costs by non-residents, does not prescribe any particular form in which the security shall be given, which question could only become material upon application for judgment against the sureties at time of rendition of judgment against the principal. 424 (2).
2. The approval of a bond or undertaking given as security for costs is not a condition precedent to the liability of the principal thereon. *Id.* (3).
3. In a suit on an undertaking given as security for costs, and actually filed with the proper officer, he cannot be asked if he received the obligation as a compliance with the order of the court requiring its execution, such inquiry being immaterial, and his views upon that question not affecting the plaintiff's right of recovery. *Id.* (4).

Digitized by Google

SENTENCE—See SYNONYMOUS TERMS.

SERVICE—See ATTACHMENT SUIT (3, 4, 5).

SEVERANCE—See WATER-RIGHTS.

STATUTES.

1. A repealing statute, without a saving clause, which substantially re-enacts the law repealed, will not affect pending suits. 133 (1).
2. It is a sound rule of construction that legislation is to have a prospective operation only, except where the contrary intent is expressly declared, or is necessarily to be implied from the terms employed. 217 (1).
3. A legislative interpretation of old laws has no *judicial* force. 323 (*a*).
4. A practical construction of a statute under which the right of appointment to office has been exercised for more than a third of a century by a municipal corporation, and not disturbed by any one, whether conclusive or not, deserves too much respect to throw any doubt on the right of *later* appointees to be treated as valid officers *de facto* at least. *Id.* (*b*).

See CRIMINAL LAW (11); DRAIN LAW OF 1885.

STATUTES CONSTRUED.

1. Under How. Stat. §§ 4238, 6300, 6301, a wife may insure the life of her husband in her favor, with a provision that in case she dies first the insurance shall be paid to their children, or to their guardian if under age. 117 (4).
2. The liability created by How. Stat. § 8813, for negligence resulting in the death of the injured party is a chose in action and assets belonging to the personal representative, to be recovered and distributed by him as other personal property. 134 (9).
3. Act No. 8, Laws of 1885, extending the time for the collection of taxes, did not revive a tax warrant which had expired by its own limitation prior to said act taking effect. 217 (2).
4. A bill to quiet title which was dismissed on general demurrer prior to Act No. 260, Laws of 1887, taking effect, may be sustained on appeal under said act, if it states *facts* entitling complainant to relief, and is properly filed as a bill to quiet title. 220 (1).
5. A charge by a township drain commissioner for the services of an attorney employed to assist him in the performance of his duties, is properly rejected by the board of supervisors

Digitized by Google

STATUTES CONSTRUED.—Continued.

under sections 3 and 4 of chapter 6 of Act No. 227, Laws of 1885. 283 (1).

6. The holder of a note *purporting* to be indorsed in *blank* by a deceased payee, is not disqualified by Act No. 139, Laws of 1885, from testifying as a witness in his own behalf in a suit upon the note, because a devisee of the payee urges a defense on the ground that the indorsement is a forgery, and indemnifies the defendant against loss in making such defense. 293 (1).

7. In *such a case* if the executor indemnifies the defendant, or assumes the defense of the suit, the plaintiff will be disqualified from testifying to matters equally within the knowledge of the testator. 297 (2).

8. Where a township-line road has been *allotted* under How. Stat. § 1307, between two townships, *each* becomes liable to keep its portion in repair, and *neither* township can legally obligate itself to aid in the erection of a bridge forming a part of that portion of said highway allotted to the other township. 441 (1).

9. The terms "committed" and "discharged," as used in How. Stat. § 6055, refer only to the *beginning* and *end* of the term of imprisonment. 330 (1, 2).

10. For a construction of certain portions of Act No. 313, Laws of 1887 (the liquor tax law so called), see *Robison v. Miner*. 549 (2, 3).

11. Act No. 313, Laws of 1887, in so far as it authorizes the board of metropolitan police of Detroit to *police* certain townships in Wayne county for the purpose of enforcing the provisions of said act therein, is invalid. 576 (1).

12. Act No. 227, Laws of 1885 (drain law), is construed in *Kinnie v. Bare*, 625.

13. The object of How. Stat. § 8788, suspending the operation of the statute of limitations during the pendency of chancery suits in certain cases, is stated in *Sweet v. Haldane*, 639 (2).

14. *Mandamus* will not lie to compel the payment to a county of its proportion of the tax ordered to be levied in 1886 by Act No. 222, Laws of 1885, for interest money alleged to be due on sales of swamp lands. 659 (1).

See GUARDIAN AND WARD (1).

STATUTE OF FRAUDS.

A contract between a corporation and citizen of Michigan for the sale of property in said State, to be there selected, weighed,

Digitized by Google

STATUTE OF FRAUDS.—Continued.

and delivered, and the contract fully performed, is subject to the statute of frauds of that State, and, in its construction, it is of no consequence where the agents or servants of the corporation reside. 189 (5).

STATUTE OF LIMITATIONS.

1. Statutes of limitation will be applied in equity where they would bar the claim at law. 220 (4).
2. An action of ejectment by the vendor in a land contract giving, if fulfilled, an estate in *fee-simple*, brought more than 20, years after default in the last payment stipulated for therein, during which time there has been an *adverse* possession, is barred by the statute of limitations. 514 (3).
3. The *real* controversy in this case seems to have turned almost entirely on the question of the statute of limitations, upon which the court charged properly, and the verdict cannot be disturbed on account of it. 519.
4. Until 1857, proceedings in equity did not operate to stay the operation of the statute of limitations. 639 (1).
5. The object of How. Stat. § 8738, is to prevent a debtor who has sought to remove litigation into the jurisdiction of an equitable tribunal, and stay or prevent legal proceedings, from getting any advantage in a suit at law by the delay which his own action in equity has caused; and it does not make any equitable suit suspend the running of the statute except where instituted or prosecuted on behalf of the same person who wishes to plead the statute. *Id.* (2).

STATUTORY FORECLOSURE.

A statutory foreclosure is not adapted to cases where there are conflicting equities, which can only be worked out and protected in a court of chancery. 230 (1).

SUBROGATION.

One loaning money to a mortgagor to pay the mortgage under an agreement from him to secure the repayment of the loan upon the mortgaged premises, which he fails to do, will be subrogated in equity to the rights of the mortgagee to the amount of the money loaned and interest thereon. 641 (1).

SWAMP LANDS.

1. On a review of the swamp-land legislation of this State, the Court are unable to find any ground upon which a *mandamus* can issue to compel the payment to the relator of its propor-

Digitized by Google

SWAMP LANDS.—Continued.

tion of the tax ordered to be levied in 1886 by Act No. 222, Laws of 1885, for interest money alleged to be due on sales of swamp lands, as the share belonging to said relator. 659 (1).

2. Courts have no power to pass upon the disposition of the proceeds arising from the disposal of the swamp lands granted this State by Congress, or to review the decision of the Legislature concerning the extent of the necessity for the use of such proceeds or of said lands for the purpose of reclaiming the lands by levees and drains. *Id.* (*a*).

3. Considering the counties in their *corporate* capacity as the intended beneficiaries, which is at least not clear, the swamp-land legislation up to 1885 was nothing more than an intended gift not carried out. *Id.* (*b*).

See CONSTITUTIONAL LAW (3).

SYNONYMOUS TERMS.

The words "conviction" and "sentence" are not synonymous. 496 (1).

TAXES.

1. A *non-owner*, but in *peaceable* possession, of land, conveyed it by warranty deed, and his grantee succeeded to *such* possession, and held *it* at the time of the commencement of an ejectment suit against him by the owner of tax titles, after which defendant's grantor acquired the *original* government title.

Held, that the defendant could contest the validity of said tax titles. 10 (1).

2. An excess of $25 in the township tax legally assessible for a given year will invalidate the sale of land upon which any portion of such excess was levied. *Id.* (2).

3. Taxes assessed to pay orders drawn by a township clerk for repairing a bridge are illegal, where the record fails to show that any such expenditure was ever authorized by the electors, or township board, or commissioner of highways, or that *that* officer ever determined that the public interests and convenience required the making of such repairs, or that the bridge ought to be built, or that he ever made a personal examination of the same; it further appearing that he never furnished the clerk with the statutory statement of the amount of orders to to be drawn for such purpose. *Id.* (3).

4. Act No. 8, Laws of 1885, extending the time for the collection

Digitized by Google

TAXES.—Continued.

of taxes, did not revive a tax warrant which had expired by its own limitation prior to said act taking effect. 217 (2).

5. A payment of taxes in advance of the time it can be enforced is *voluntary*, and cannot be recovered back without statutory permission. 263 (1).

6. Where payments are involuntary, and made under legal dures, there has never been any rule requiring a *specific* protest. *Id.* (2).

TAXING DISTRICT—See CONDEMNATION PROCEEDINGS.

TENANTS IN COMMON.

A tenant in common has a right of action against his co-tenant for a wrongful conversion of the *joint* property. 33 (2).

TITLE—See EJECTMENT (1); LAND CONTRACT (1, 2); SALE (1, 3, 4).

TITLE TO OFFICE—See MANDAMUS.

TOLL-GATE—See PLANK-ROAD COMPANIES.

TOWNSHIP DRAIN COMMISSIONER.

1. A township drain commissioner has no jurisdiction to locate a township drain upon the line of a drain laid by the county drain commissioners, unless such first drain has been legally vacated or abandoned. 273 (1).

2. A township drain commissioner, before proceeding to construct a drain, must obtain a release of the right of way and of damages, or a condemnation of such right of way, and the compensation therefor must be ascertained. *Id.* (3).

3. A drain located, established, and constructed by county drain commissioners under color of the statute, and its cost and expense having been paid for by the parties assessed without objection as to any illegality or irregularity in the proceedings, and having been in use and acquiesced in as a public drain for 15 years or more, must be regarded and recognized by the township drain commissioner as a public drain, duly and legally established. *Id.* (4).

4. A township drain commissioner is not authorized to employ an attorney to assist him in the performance of his duties at the expense of tax-payers, and a charge for expenses thus incurred is properly rejected by the board of supervisors under sections 3 and 4 of chap. 6 of Act No. 227, Laws of 1885. 283 (1).

5. If a township drain commissioner employs clerical assistance in the performance of his official duties, the necessity for such

Digitized by Google

TOWNSHIP DRAIN COMMISSIONER.—Continued.
work must appear before it can be charged for, and such charges must be brought within the statutory limits before they can be held to be lawfully authorized; and in the absence of such showing such charges are properly rejected by the board of supervisors. *Id.* (2).

TOWNSHIP LINE ROAD—See HIGHWAYS (4).

TRESPASS.

An action of trespass for the ouster of *sublessees* from the possession of a mill standing on leased ground by the owners of the freehold, if sustainable at all, belongs to the sublessees. 344 (1).

See RAILROAD COMPANIES.

TRIAL.

It is the privilege of a plaintiff, in any case, to forgive to the defendant so much of his claim, as established on the trial, as he may choose. 80 (3).

TRUSTS.

Where land is conveyed upon trusts, and the grantor absolutely divests himself of his title, without any power of revocation, and 30 years have elapsed, and the rights of third parties have intervened, a bill will not lie to revoke said deed for the alleged non-performance of said trusts. 220 (2).

ULTRA VIRES—See CORPORATIONS (3).

VARIANCE.

Where, on the introduction of evidence of the *cause* of the injury complained of in an action for negligence, no objection was raised on account of variance from the *case* alleged in the declaration, such objection made by a motion in arrest of judgment ought to be disregarded, unless the variance is substantial, and, if so, the declaration should be treated as amended to meet the proofs made. 133 (3).

WAIVER.

1. Waiver may be proved indirectly, by circumstances, as well as by direct testimony; and whether made out or not is a question for the jury. 463 (1).
2. A party always has the option to waive a condition or stipulation made in his favor, and such waiver is not repugnant to the written agreement, because it would only be the exercise of

Digitized by Google

WAIVER —Continued.

an option which the agreement left it in the power of the party to make. *Id.* (2).

3. Where the *fact* of waiver is sought to be established by circumstances, or inferred from facts proved, or where the testimony is doubtful or conflicting, it is a question for the jury. 465 (1).

4. Where there is no conflicting testimony, and all the facts and circumstances are admitted or conceded, it is the province of the court to inform the jury, as matter of law, whether a waiver has been established or not. *Id.* (2).

WARRANTY—See DAMAGES (7).

WATER-POWER—See WATER-RIGHTS.

WATER-RIGHTS.

The right of a land-owner to sever the right to a water-power from a particular portion of his land cannot be doubted. 64 (1).

WILL—See PALMS WILL CASE.

WITNESS.

It is error for the trial court to limit the number of witnesses to be sworn by either party, upon a material and one of the main issues in the suit. 341.

See BOOKS OF ACCOUNT (1); EVIDENCE (13–15, 18).

WORDS AND PHRASES.

The terms "committed" and "discharged" are words of recognized legal meaning, and refer only to the *beginning* and *end* of the term of imprisonment. 330 (1).

LAWS REFERRED TO.

Constitution of Michigan.

	Page.		Page.
Art. vi. § 31	560	Art. xvi. § 5	126
Art. xiii. § 12	560	Art. xviii. § 2	629
Art. xiv. § 9	629		

Compiled Laws of 1857.

§ 1057	448	Page 1403, 1404	230

Compiled Laws of 1871.

§ 1255	448	Page 1975	230

Digitized by Google

Revised Statutes of 1838.

	Page.		Page.
§ 20, c. 4, tit. 6	448	Pages 573, 574	229

Revised Statutes of 1846.

§ 16, Page 135	448	Pages 598, 599	229

Howell's Statutes.

Chap. 96, §§ 17, 29	265	§ 6626	227
" 213, 216	359, 363	6830	452
§ 518	327	6839	451
1298	19	6840	452
1300	19	6846	453
1307	448	6850	452
1445	449	6899	85
2271	477	7094	479
4238	131	7545	175, 259, 295
5553	371	7710	245
5556	387	7808, 7809	78
5578	380	8320	206
5704	438	8700	250, 517
5851	380	9055	331
5854	642	9140	502
6295	126	9141	500
6300, 6301	131	9174	469
6311	368	9257	481, 656
6814	351	9424, 9425	499, 500
6186	352	9514	502

Session Laws.

1857, Page 236, § 9	661	1885, Act 227, c. 9, § 3	285, 626
1858, Page 171, § 5	661	1885, Pages 245, 303	662
1865, Page 99	578	1887, Act 20	461
1875, Act 187	250	1887, Act 260	227
1879, Sec. 1442, 1443	449	1887, Act 264	135
1885, Act 8	218, 219	1887, Act 313, §§ 9, 83	582, 577
1885, Act 139	295		

Chancery Rule.

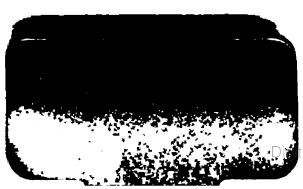
	Page.
No. 6	433

4998 052

Digitized by Google

Digitized by Google

Digitized by Google



Digitized by Google

Digitized by Google